2001

The State of Utah v. Anthony James Wanosik : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Petitioner,	:	
v.	:	
ANTHONY JAMES WANOSIK,	:	Case No. 20010809-SC
Defendant/Respondent.	:	

BRIEF OF RESPONDENT ON CERTIORARI REVIEW

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

CASES

Page

Page

Page

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff/Petitioner,	:	
v.	:	
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JURISDICTIONAL STATEMENT

Utah Code Ann. § 78-2-2(3)(a) (Supp. 2001) grants jurisdiction.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly concluded that the judge erred in sentencing Wanosik *in absentia* where the trial judge presumed that Wanosik's absence was knowing and voluntary when Wanosik did not appear at sentencing?

Standard of Review: On certiorari, this Court reviews the decision of the Court of Appeals for correctness. State v. Layman, 1999 UT 79, ¶3, 985 P.2d 911 (further citations omitted). This issue presents a legal question which was reviewed below for correctness. State v. Wanosik, 2001 UT App 241, ¶8, 31 P.3d 615.

2. Whether the Court of Appeals correctly concluded that Respondent's sentence must be vacated based on a violation of Utah R. Crim. P. 22(a) and due process where the sentencing judge imposed the statutory maximum sentence without affording counsel the opportunity to make a statement regarding information relevant to sentencing and without basing the sentence on reliable and relevant information?

Standard of Review: This Court reviews the decision of the Court of Appeals for correctness. Layman, 1999 UT 79, ¶3 (further citations omitted). This issue was reviewed below for correctness. Wanosik, 2001 UT App 241, ¶9.

OPINION BELOW

State v. Wanosik, 2001 UT App 241, 31 P.3d 615, is in Addendum A.

TEXT OF PERTINENT RULE AND CONSTITUTIONAL PROVISIONS

The text of the following rule and constitutional provisions is in addendum B:

Utah R. Crim. P. 22;
Article I, sections 7 and 12, Utah Constitution;
Due Process Clause, Amend. XIV, United States Constitution.

STATEMENT OF THE CASE

Defendant/Respondent Anthony Wanosik ("Respondent" or "Wanosik") pled guilty before Third District Court Judge Judith S. Atherton to class A and B misdemeanors for attempted and actual possession of a controlled substance. R. 18-24, 27-28, 53. Judge Atherton set sentencing for May 26, 2001 before Third District Judge J. Dennis Frederick and directed Wanosik to go to Adult Probation and Parole ("AP&P") for preparation of a presentence report ("PSR"). R. 28. When Wanosik did not appear at sentencing, Judge Frederick sentenced him *in absentia* to the statutory maximum on each count. R. 54:3.[1]

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[1] The judge in this case was the only Third District Court judge who routinely sentenced defendants *in absentia* when they did not appear at sentencing. This sentencing judge sentenced a number of criminal defendants to the statutory maximum

The Court of Appeals vacated the sentence and remanded the case for resentencing because Judge Frederick imposed sentence without affording defense counsel the opportunity to address information relevant to sentencing and without relying on relevant and reliable information, in violation of Utah R. Crim. P. 22(a) and due process. Wanosik, 2001 UT App 241, ¶¶28-36. The Court of Appeals also held that the judge erred in sentencing Wanosik *in absentia* because the judge had improperly analyzed whether the absence was voluntary; the error in sentencing Wanosik *in absentia* was harmless, according to the Court of Appeals, because while being held in jail on the sentence in this case, Wanosik sent a letter to the judge stating that he did not have a legitimate excuse for not appearing at sentencing. Id., ¶¶19-26.

STATEMENT OF FACTS

Wanosik was apprehended after a police officer saw him rummage through donated items which had been left at a Deseret Industries store and place something in his pocket. R. 6. During a subsequent search, officers found the items which led to the charges in this case. R. 6-7. After pleading guilty to a class A and a class B

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under almost identical circumstances where the judge simply imposed the maximum sentence without affording counsel the opportunity to speak and without otherwise basing the sentence on reliable and relevant information. A number of those cases were before the Court of Appeals when the decision in this case was issued. See e.g. State v. Gardner, 2001 UT App 335; State v. Samora, 2001 UT App 266; State v. Rogers, Case No. 20000812-CA; State v. Vicente, 2002 UT App 43; State v. Bird, 2001 UT App 333; State v. Wheeler, 2001 UT App 276; State v. Payne, 2001 UT App 242. Wanosik was the lead case and is the only case in which the Court of Appeals issued a published opinion.

misdemeanor, Wanosik went to AP&P for preparation of a presentence report. R. 52. AP&P recommended that Wanosik serve twenty days in jail with credit for time served, followed by substance abuse treatment. R. 52:11.

On May 26, 2000, Wanosik did not appear at sentencing. R. 29-30, 54; see transcript in Addendum C. Defense counsel told the judge that Wanosik had appeared for his PSR and received a favorable report, and that she expected him to be at the sentencing hearing. R. 54:1. Defense counsel also told the judge that she thought Wanosik might have written the wrong date down, and asked for the opportunity to find him. R. 54:1. Without affording either party the opportunity to address factors relevant to sentencing and without referring to the PSR or following its recommendations, the judge concluded that Wanosik was voluntarily absent and sentenced Wanosik *in absentia* to a concurrent maximum sentence for each misdemeanor.

> [DEFENSE COUNSEL[2]]: Your Honor, my last matter before you is Anthony James Wanosik, and I've looked for him but I've not been able to find him, your Honor. He did obtain his pre-sentence report.
>
> THE COURT: Is Anthony James Wanosik in the courtroom?
>
> (No response)
>
> THE COURT: Yes, let's discuss that matter for a moment. This is case No. CR00-5943. Ms. Garland, you're appearing in his behalf?

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[2] The transcript shows that the trial court made this statement. Read in context, however, it appears that defense counsel was actually speaking. R. 54:2.

DEFENSE COUNSEL: I am, your Honor. I think given that he did go and obtain his pre-sentence report he was intending to show up today, and so I would ask that you hold on to any warrants and give me a chance to find him. I believe he may have simply written down the wrong date.

THE COURT: Well - -

DEFENSE COUNSEL: I believe that, Judge, because this is a fairly favorable pre-sentence report, so he would have had no reason to try and avoid court today, it would - -

THE COURT: Presumably.

DEFENSE COUNSEL: Yes, it would have been in his best interest to appear.

THE COURT: I think in the meantime, counsel, given his failure to appear I will terminate his pre-trial release, issue a warrant for his arrest returnable forthwith no bail. My inclination is to sentence him today, and I recognize you would prefer that I did not, but I am inclined to do so. It is curious that he has failed to appear today, although I can only assume because he has not been in touch with you nor has he been in touch with my court that he has chosen to voluntarily absent himself from these proceedings.

Consequently, it is the judgment and sentence of this Court that he serve the term provided by law in the adult detention center of one year for the class A misdemeanor crime of attempted possession of a controlled sentence, and six months for the possession of a controlled substance, a misdemeanor charge to which he pled guilty. I will order that those terms be served concurrently and not consecutively, and that they be imposed forthwith.

Ms. Garland, in the event he is in touch with you or shows up before he's arrested, then you may approach me, but in the meantime, Mr. D'alesandro, you prepare the findings of fact conclusions of law and order determining voluntary absent compliance, and that will be the order.

DEFENSE COUNSEL: Judge, I would object to that order because I don't think that it takes into account his due process rights or his rights about - -

THE COURT: Right.

DEFENSE COUNSEL: However, I realize that's your order.

THE COURT: Your objection is noted. I'll grant him credit for the eight days he served originally awaiting imposition or a resolution.

DEFENSE COUNSEL: All right.

THE COURT: All right, thank you, Ms. Garland.

R. 542-4.

Wanosik was booked on this case on October 4, 2000. R. 56. On October 10, 2000, Wanosik sent a letter to Judge Frederick, asking for release and indicating that he did not have a "legitimate excuse" for missing court. R. 66.[3]

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly concluded that the trial court erred in sentencing Wanosik *in absentia*. As the Court of Appeals concluded, the trial court erred in assuming that Wanosik's absence from sentencing was voluntary when Wanosik did not appear at sentencing. Additionally, Wanosik's absence was not a knowing waiver of his right to presence where the record does not demonstrate that he knew the sentencing would proceed without him if he did not appear. Moreover, this Court should adopt a balancing test which requires trial courts to balance the public's interest in proceeding *in absentia* against the defendant's interest in being present before permitting trial courts to proceed *in absentia*. Such a balancing of interests would protect the integrity of the

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[3] Wanosik was released from the jail in June 2001. He served the entire sentence in this case, with credit for good time.

system, the dignity of individual defendants, and the right to presence by ensuring that sentencing *in absentia* occurs only in those cases where the public interest in proceeding requires that the sentencing be held without the defendant.

The Court of Appeals also correctly concluded that the sentence in this case must be vacated because it was imposed in violation of Utah R. Crim. P. 22(a) and due process. The plain language of rule 22(a) requires a sentencing judge to afford the parties an opportunity to speak at sentencing. Because the defendant has the right to counsel at sentencing and because the rule read as a whole contemplates input from both parties, the Court of Appeals correctly concluded that rule 22(a) requires the trial judge to afford defense counsel the opportunity to speak at sentencing.

The Court of Appeals correctly reviewed this issue under Utah R. Crim. P. 22(e). This Court should refuse to review the state's claim that a rule 22(e) review was not the correct procedure because this issue was not raised in the state's petition for writ of certiorari and is not fairly included in the issues which were raised. Even if the issue is reviewed, it should be rejected because the state's claim is incorrect. An illegal sentence or a sentence imposed in an illegal manner can be reviewed for the first time on appeal. The only circumstances under which this Court has rejected rule 22(e) review is when the defendant is attacking the conviction rather than the sentence. In this case where Wanosik was attacking his illegal sentence which was imposed in an illegal manner, the issue could be reviewed on appeal pursuant to rule 22(e).

The Court of Appeals also correctly concluded that the trial court violated due process in failing to base the sentence on relevant and reliable information. The judge failed to conduct a full and fair sentencing or to consider pertinent factors. The record reveals that the only factor considered by the court in imposing the maximum sentence was Wanosik's absence whereas numerous factors supported probation. Because the sentence was not based on relevant and reliable information, it was properly vacated.

ARGUMENT

POINT I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL JUDGE ERRED IN SENTENCING RESPONDENT *IN ABSENTIA*.

Article I, section 12 of the Utah Constitution guarantees a criminal defendant the right to presence at all critical proceedings. Sentencing is a critical stage of the proceedings at which a defendant has the right to be present unless he knowingly and voluntarily waives that right. See State v. Anderson, 929 P.2d 1107, 1109-11 (Utah 1996); State v. Houtz, 714 P.2d 677, 678 (Utah 1986) (*per curiam*).

The Court of Appeals correctly held in this case that the state had not sustained its burden of establishing that Wanosik's absence from sentencing was voluntary. Wanosik, 2001 UT App 241, ¶¶19-25. In reaching that decision, the lower court relied on the right to presence, case law from Utah appellate courts, and the Utah Rules of Criminal Procedure. Wanosik, 2001 UT App 241, ¶19-25. The trial court also erred in sentencing Wanosik *in absentia* because Wanosik did not knowingly waive his right to presence. Additionally, because the public interest in proceeding with the sentencing *in absentia*

did not outweigh Wanosik's interest in being present, the trial court erred in sentencing Wanosik *in absentia.*

A. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT ERRED IN PRESUMING THAT WANOSIK'S ABSENCE WAS VOLUNTARY.

1. The Court of Appeals' Decision Is Based on Precedent.

As is the case with waiver of any constitutional right, a voluntary waiver of the right to presence cannot be presumed. Houtz, 714 P.2d at 678. The burden is on the state to establish voluntariness. State v. Wagstaff, 772 P.2d 987, 992 (Utah 1989).

Relying on Houtz and Anderson, the Court of Appeals correctly concluded in this case that "'voluntariness may not be presumed by the trial court.'" Wanosik, 2001 UT App 241, ¶21 (quoting Houtz, 714 P.2d at 678). In fact, "the constitutional right to appear and defend in person and by counsel is a sacred right of one accused of crime which may not be infringed or frittered away." State v. Aikers, 51 P.2d 1052, 1055 (Utah 1935). Given the fundamental and "sacred" nature of this right, the presumption against waiver is strong. State v. Okumura, 570 P.2d 848, 852 (Haw. 1977) (cited favorably in Houtz, 714 P.2d at 678). This strong presumption against waiver is consistent not only with Houtz, but also with the cases cited in Houtz, and the United States Supreme Court decision in Johnson v. Zerbst, 304 U.S. 458 (1938).

Houtz demonstrates that the voluntariness of Wanosik's absence could not be presumed when he did not appear. In Houtz, when the defendant did not appear at trial,

the judge continued the case until the next day. When the defendant again did not appear, the prosecutor told the court that Houtz had been arrested for drunk driving two days earlier in California. Rather than continuing the trial, the trial court "determined that defendant had voluntarily chosen to absent himself from the trial because he had left Utah in violation of his bail." Houtz, 714 P.2d at 678. This Court rejected that conclusion, reversed the conviction, and remanded for a new trial because the trial court "made inadequate inquiry into defendant's ability to appear [at trial]." Id.

Like Wanosik, Houtz did not appear and apparently was not in contact with his lawyer. Moreover, Houtz had left the state in violation of his bail whereas there is nothing in the record suggesting Wanosik had left the state. Just as the judge did not make "adequate inquiry into [Houtz's] ability to appear" (id.), the judge in this case did not make adequate inquiry into Wanosik's ability to appear. Without more, Wanosik's nonappearance was not sufficient to establish a voluntary waiver of his right to presence.

The decision in Wanosik that the trial judge cannot presume voluntariness but instead must make "an inquiry into defendant's ability to appear" (Wanosik, 2001 UT App 241, ¶21(citing Houtz, 714 P.2d at 678)) is also consistent with this Court's decision in Anderson, 929 P.2d 1107. This Court concluded, however, that Anderson had voluntarily waived his right to presence at sentencing where (1) he agreed in writing and orally that he would be tried *in absentia* if he failed to appear at trial; and (2) after not appearing at trial and being convicted *in absentia* pursuant to his waiver, Anderson did

not appear at sentencing. Anderson, 929 P.2d at 1110-12.

Relying on cases from other jurisdictions, this Court reasoned in Anderson that since Anderson had not challenged the propriety of the trial *in absentia* and the trial *in absentia* was properly conducted pursuant to Anderson's knowing and voluntary waiver of his right to presence, it necessarily followed that the trial court could sentence Anderson *in absentia* and that it would be anomalous to preclude sentencing *in absentia* under such circumstances. Id. at 1110 (citing Brewer v. Raines, 670 F.2d 117, 119 (9th Cir. 1982)) ("To hold that the Constitution permits a person to be tried and convicted while voluntarily absent, and yet, somehow, precludes the sentencing *in absentia* of the same person would be, at the least, anomalous."). The decision in Anderson did not undercut Houtz or the requirement that voluntariness cannot be presumed and must instead be established by the state. Instead, Anderson held that in cases where a defendant knowingly and voluntarily waives his right to presence at trial, the court can thereafter sentence *in absentia* such a defendant who does not appear at sentencing.

The state is incorrect when it argues that this Court held in Anderson that "once the State had met its burden to show that Anderson had notice, the burden shifted to Anderson to present some reason for his absence." State's brief at 9. The Court in Anderson did not discuss burden shifting. Instead, it focused on the fact that Anderson had knowingly and voluntarily waived his right to presence at trial and held that sentencing *in absentia* was also appropriate when the defendant, who had not maintained

contact with his attorney, failed to appear at sentencing. Anderson, 929 P.2d at 1110-1111. Contrary to the state's argument, Anderson does not address the issue raised in this case as to whether a defendant who has appeared throughout the proceedings, but fails to appear at sentencing, can be sentenced *in absentia* based on his nonappearance.

In Anderson, this Court cited Wagstaff, 772 P.2d 987 for the proposition that "[a]ny waiver of the right to be present 'must be voluntary and involve an intentional relinquishment of a known right.'" Anderson, 929 P.2d at 1110 (quoting Wagstaff, 772 P.2d at 990). Wagstaff also mandates that "[t]he state carries the burden of showing voluntariness." Id. (citing State v. Ross, 655 P.2d 641, 642 (Utah 1982 (*per curiam*)). Additionally, Wagstaff reiterates that the totality of the circumstances are considered in determining whether a defendant waived his right to presence. Wagstaff, 772 P.2d at 990.

Beyond these general propositions, Wagstaff provides little guidance for the issue before this Court because that case was in a different procedural posture and involved a distinct factual situation. After being tried *in absentia*, Wagstaff filed a motion to arrest judgment with accompanying affidavits outlining his reasons for missing the trial. The lower court concluded that Wagstaff's absence was voluntary under the circumstances outlined by Wagstaff and refused to vacate its previous order that Wagstaff waived his right to presence. Id. Because the trial court reaffirmed its conclusion that the absence was voluntary based on the totality of circumstances outlined in the affidavits filed as

part of the motion to arrest judgment, Wagstaff is not instructive as to whether nonappearance at sentencing is sufficient to establish a voluntary waiver.

State v. Myers, 508 P.2d 41 (Utah 1973) is consistent with Wanosik. With little analysis, this Court concluded that Myers waived his right to presence when he failed to return for the second day of trial. Myers, 508 P.2d at 42-43. Crosby v. United States, 506 U.S. 255, 258-61 (1993) recognizes that a person who fails to appear after a trial has commenced knows that the trial will proceed without him, and knowingly and voluntarily waives his right to presence. Whereas a defendant who does not appear on the first day of trial would not know that the trial would go on without him, a mid-trial flight demonstrates a knowing and voluntary waiver of the right to presence. Under the totality of circumstances in Myers, where the trial was underway when the defendant failed to return for the second day of trial, Myers waived his right to presence.

Despite the repeated mandate that the right to presence is a sacred one, that there is a presumption against waiver of that right, and that the state has the burden of establishing that a defendant knowingly and voluntarily waived that right in order to proceed *in absentia*, the state argues that any determination as to whether the defendant waived his right to presence must be made under some sort of burden shifting analysis. State's brief at 7-11. Utah case law does not support the state's burden shifting argument. Instead, Utah case law repeatedly clarifies that there is a strong presumption against waiver of this important right and that the state must establish the knowing and

voluntary character of any waiver of the right to presence.

The twenty-year-old cases cited by the state in support of its burden shifting analysis are not compelling. See Petitioner's brief at 9, citing United States v. Marotta, 518 F.2d 681 (9th Cir. 1975); State v. Cotton, 621 S.W.2d 296, 298 (Mo. App. 1981); Moore v. State , 670 S.W.2d 259, 261 (Tex. Crim. App. 1984). All three cases involve circumstances where the defendant fled mid-trial. As Crosby and Taylor v. United States, 414 U.S. 17, 20 (1973) recognize, it is reasonable to conclude when a defendant flees mid-trial that the defendant knew the trial would go on without him and chose not to attend. All three courts conducted a totality of the circumstances review. See e.g. Cotton, 621 S.W.2d at 298; Moore, 670 S.W.2d at 261. Counsel's failure to locate Moore after contacting hospitals was a significant additional circumstance supporting the court's conclusion that Moore knowingly and voluntarily waived his right to presence. Id. Efforts by law enforcement to locate Cotton after he failed to appear mid-trial were likewise significant in supporting the waiver in that case. Cotton , 621 S.W.2d at 298.

While Cotton, 621 S.W.2d at 298 does state that there is a presumption of voluntariness when a defendant does not appear, such a presumption is contrary to case law from this Court and the United States Supreme Court. Moreover, because the totality of circumstances in Cotton demonstrated voluntariness, the presumption shifting language was not necessary to the conclusion.

Moore recognizes that the defendant could have put on evidence at a motion for

new trial which would refute the voluntariness conclusion made at the time the trial court proceeded *in absentia*. Moore, 670 S.W.2d at 261. Such a recognition does not shift the burden of establishing voluntariness. Instead, in cases where the totality of the circumstances demonstrated a constitutional waiver and the court proceeded *in absentia*, the defendant can later ask the court to reconsider based on additional information made known to the court at a motion for new trial or to arrest judgment.

In its decision, the Court of Appeals outlined some things that the state might do to establish a voluntary absence. Wanosik, 2001 UT App 241, ¶23. These possible inquiries provide suggestions as to "avenues for establishing voluntariness," but are not mandatory. Id. Instead, the possible suggested inquiries include information which, under a totality of circumstances test, might tip the analysis in favor of a voluntariness determination. The suggested possible avenues for establishing voluntariness include: (1) finding out whether the defendant is incarcerated; (2) checking local hospitals; (3) checking with defendant's employer; (4) checking defendant's residence or other contact numbers; (5) checking with Pre-Trial Services; or (6) checking with the bail bond company or person who posted bond. Id.

The state takes issue with this outline of possible inquiries it might make in order to establish that a defendant has voluntarily waived his right to presence, arguing that the approach is "aberrational" and no other jurisdiction "mandate[s] extensive investigational inquiries like those that the court of appeals' opinion requires to rebut a presumption of

involuntariness." State's brief at 11. The state's criticism is easily dispensed with, however, because Wanosik does not *mandate* that all of the inquiries listed be made. Instead, Wanosik provides the list as a practical suggestion to prosecutors who hope to proceed with a sentencing *in absentia* when a defendant does not appear.

Additionally, the list of possible inquiries is based on a review of case law and the circumstances which affect the determination of whether an absence is voluntary as well as common sense. For example, Houtz indicated that a defendant's incarceration is a factor that weighs against a conclusion that the absence was voluntary. 714 P.2d at 678. Moore indicates that a defendant's hospitalization weighs against a determination that the absence is voluntary. 670 S.W.2d at 261. The unsuccessful efforts made to locate a defendant are also factors that courts consider and rely on in concluding that the absence is voluntary. See e.g. Cotton, 621 S.W.2d at 298. Checking with Pre-Trial Services, the bail bond company, defendant's employer, and any contact numbers is simply a common sense approach to attempting to locate the defendant; failure to locate the defendant after such inquiries are made may support a determination that the absence is voluntary. Given the strong presumption against waiver of the right to presence, the Court of Appeals' suggestions are not aberrant and instead indicate some circumstances that might demonstrate waiver.

The Court of Appeals' decision is based on Houtz, Anderson, and other precedent which establish that there is a strong presumption against waiver and that the state has

the burden of overcoming that presumption and establishing that the defendant voluntarily waived his right to presence if the state wishes to proceed with a sentencing *in absentia*. Additionally, the Court of Appeals' decision properly incorporates the totality of the circumstances test for determining whether a defendant has voluntarily waived his right to presence. Pursuant to controlling case law, the Court of Appeals correctly concluded that the trial court erred in assuming that Wanosik's absence established that he voluntarily waived his right to presence.

2. Policy Considerations Support the Court of Appeals' Conclusion that the Trial Court Incorrectly Presumed that the Absence Was Voluntary.

The critical importance of the right to presence at sentencing supports the Court of Appeals' reliance on the strong presumption against waiver of that right as well as the court's suggestions as to factors which might overcome that presumption. "[T]he common law has traditionally required that the defendant be present at his sentencing." United States v. Turner, 532 F. Supp. 913, 915 (D. No. Cal. 1982); see also United States v. Lastra, 973 F.2d 952, 955 (D.C. Cir. 1992) (citation omitted). Presence is of critical importance at sentencing not only because it allows judges to be presented with all information necessary for a full and fair sentencing, but also because it allows the judge to question and admonish the defendant. "It is only when the defendant is before the court that a reasonable and rational sentencing can take place." State v. Fettis, 664 P.2d 208, 209 (Ariz. 1983).

> Presence is of instrumental value to the defendant for the exercise of other rights, such as to present mitigating evidence and challenge aggravating evidence, and it may also be advantageous to him that the decision maker be required to face him. The state may have an interest in the presence of the defendant in order that the example of personal admonition might deter others from similar crimes. Moreover, it may sometimes be important that the convicted man be called to account publicly for what he has done, not to be made an instrument of the general deterrent, but to acknowledge symbolically his personal responsibility for his acts and to receive personally the official expression of society's condemnation for his conduct. The ceremonial rendering of judgment may also contribute to the individual deterrent force of the sentence if the latter is accompanied by appropriate judicial comment on the defendant's crime.

Turner, 532 F. Supp. at 915 (citation omitted).

A defendant's absence at sentencing does not carry the same potential for "immobiliz[ing] or frustrat[ing] the justice system" as the defendant's absence at trial carries. Id. When trials are continued indefinitely because of an absent defendant, witnesses may be lost and evidence may be compromised, making it difficult to obtain a conviction. After a defendant has been convicted, however, such danger "has largely although not entirely disappeared." Id. The conviction is in place and all that remains is sentencing the defendant when he is located. The minimal risk associated with delay of an appeal or possible retrial caused by postponing sentencing until a defendant is located is far outweighed by the importance of a defendant's presence at sentencing. Id.[4]

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[4] The possible collateral consequences claimed by the state in footnote 5 of its brief at 14 do not outweigh the critical importance of the right to presence at sentencing. Moreover, neither example of a collateral consequence of the Wanosik decision pans out when scrutinized. For example, a judge can always order appropriate conditions for pretrial release. This means that a judge can order that person charged with a crime not possess weapons while out of jail on pretrial release. A conviction is not necessary.

In addition, presence at sentencing preserves the dignity of the individuals being sentenced as well as the integrity of the system itself.

> Respect for the dignity of the individual is at the base of the right of a man to be present when society authoritatively proceeds to decide and announce whether it will deprive him of life or how and to what extent it will deprive him of his liberty. *It shows a lack of fundamental respect for the dignity of a man to sentence him in absentia.* The presence of the defendant indicates that society has sufficient confidence in the justness of its judgment to announce it in public to the convicted man himself. Presence thus enhances the legitimacy and acceptability of both sentence and conviction.

Id. at 915-16 (citations omitted) (emphasis added).

Recognizing the importance of presence at sentencing and enforcing the presumption against waiver of that right does not create an unworkable situation. Wanosik does not say that defendants cannot be sentenced *in absentia*. Instead, it simply reaffirms that the state must establish under the totality of the circumstances that an absence was voluntary and the trial court cannot simply assume that because a defendant is not present for sentencing, he has voluntarily waived his right to presence.

While the state is correct that many defendants fail to appear at sentencing, this is the only Third District judge who routinely sentenced such people *in absentia*. In light

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Moreover, sentencing a defendant *in absentia* and ordering that he not possess weapons has little practical effect since the defendant is not present for the order. As far as the state's second example, if a defendant is present and testifying so as to allow for impeachment under rule 609, he will also have been picked up for the warrant for failing to appear for sentencing. This means that by the time any trial was held where the prior could be used for impeachment, sentencing would have occurred in the case where the defendant failed to appear at sentencing.

of the fact that a significant number of judges do not ordinarily sentence defendants *in absentia* and the system has not been thwarted or rendered impotent, it is safe to assume that the Court of Appeals' adherence to the presumption against waiver will not have the devastating effects suggested by the state. See state's brief at 12-14.

Moreover, this is not a case where the defendant disappeared for a long time and otherwise threatened the orderly administration of justice. Wanosik's pretrial sheet, which was available to the trial judge had he been inclined to look, listed Wanosik's home address. R. 8. Wanosik had lived in the area for 50 years and with his wife, Pamela, for eighteen years. R. 8. He had three children, two of whom he was supporting. R. 8. He had the same employer for a year and listed the employer's phone number. R. 8. Had the trial judge continued sentencing to allow the parties to attempt to locate Wanosik, he almost certainly would have been located and brought to court. In fact, Wanosik was booked on the warrant shortly after the absentia sentencing. R. 56, 69. The state's overanxious concerns about the wheels of justice grinding to a halt if courts are not allowed to sentence *in absentia* those defendants who do not appear at sentencing simply do not apply to this case or any case where the defendant does not appear at the first scheduled sentencing hearing and no effort is made to locate him.

As a final matter, the state argues that there are adequate remedies available for people who are sentenced *in absentia* where it later turns out that the absence was not voluntary. State's brief at 14. According to the state, the defendant can either request a

review with the trial court or appeal the sentence.[5] Wanosik did both and nevertheless served the entire sentence even though the presentence report recommended twenty days. These were empty remedies for Wanosik and any other defendant in similar circumstances because any review of the sentence is conducted by the same judge who sentenced the defendant *in absentia*; that judge can deny a review hearing. Additionally, because the appellate process takes a long time, misdemeanor sentences are generally served before the appeal is resolved, as was the case here.

The Court of Appeals followed existing case law, recognized the importance of the right to presence, and provided a workable approach for cases in which a defendant fails to appear at sentencing. In cases where the state is adamant about proceeding with the sentencing, the state will make the appropriate inquiry, as it has done in a significant number of cases since the Wanosik decision was issued. Precluding sentencing courts from presuming voluntariness based solely on the defendant's absence helps preserve the sacredness of the right to presence, the integrity of the system, the dignity of the individual defendant, and the protections required by due process at sentencing.

B. WANOSIK DID NOT KNOWINGLY WAIVE HIS RIGHT TO PRESENCE.

As is the case with voluntariness, the state was required to establish that Wanosik knowingly waived his right to presence at sentencing. The presumption against waiver

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[5] The state also suggests that a defendant could file a post-conviction writ. That was not true for Wanosik, whose appeal was pending when he was arrested.

applies with equal force to the knowledge aspect of the waiver test.

In order to knowingly waive the right to presence, the record must establish not only that Wanosik knew the date of his sentencing hearing, but also that he knew the sentencing would proceed even if he were not present. See United States v. McPherson, 421 F.2d 1127, 1129 (D.C. Cir. 1969) (recognizing that in order for a waiver to be knowing, record must establish not only that defendant knew of his right to be present, but also that defendant knew that trial would proceed if he were not there). While knowledge that the trial will commence if the defendant is not present cannot be imputed to the defendant who does not appear at the start of his trial (see Crosby, 506 U.S. at 261), a defendant who flees mid-trial is likely to know that the trial will go on without him. Id. at 261. The Crosby Court stated:

> "Since the notion that trial may be commenced in absentia still seems to shock most lawyers, it would hardly be appropriate to impute knowledge that this will occur to their clients." Starkey, Trial in Absentia, 54 N.Y. St. 262 B.J. 30, 34 n. 28 (1982). It is unlikely, on the other hand, "'that a defendant who flees from a courtroom in the midst of a trial - - where judge, jury, witnesses and lawyers are present and ready to continue - - would not know that as a consequence the trial could continue in his absence.'" Taylor v. United States, 414 U.S. 17, 20, 94 S.Ct. 194, 196, 38 L.Ed.2d 174 (1973) [further citation omitted].

Id.

Just as knowledge that a trial will commence in the defendant's absence cannot be imputed to a defendant, knowledge that a judge will sentence a defendant if the defendant is not present cannot be imputed to a defendant. Because any sentence imposed by a judge needs to be carried out, it seems likely that defendants would assume

that they need to be present in order for the sentencing to proceed. Moreover, due to the critical importance of presence to sentencing, several jurisdictions refuse to allow sentencing *in absentia* unless there are extraordinary circumstances. Fettis, 664 P.2d at 209.

Extraordinary circumstances which would allow for sentencing *in absentia*, while "rare indeed" (id.), include circumstances where the defendant expressly waived his right to be present at sentencing. Turner, 532 F. Supp. at 916 (citing United States v. Brown, 456 F.2d 1112, 1114 (5th Cir. 1972), cert. denied, 415 U.S. 960 (1974)). Extraordinary circumstances allowing sentencing *in absentia* may also include circumstances where the defendant has been fully informed that sentencing will proceed in his absence if he does not appear. See Lowery v. State, 759 S.W.2d 545, 546 (Ark. 1988) (court is "unwilling to hold that the fundamental right to be present at sentencing was knowingly waived in the absence of language specifically advising an accused that he is subject to being sentenced prospectively without his being present"); People v. Link, 685 N.E.2d 624, 626 (Ill. App. 1997) (in order to try or sentence defendant *in absentia*, state must establish defendant had knowledge of the date of the proceeding and was warned that the proceedings could go on without him if he did not appear); People v. Bennett, 557 N.Y.S.2d 731, 732 (N.Y. App. Div. 1990) (sentencing *in absentia* upheld where defendant was fully advised of the consequences of failing to appear and agreed to being sentenced *in absentia* if he intentionally failed to appear).

Requiring that a defendant be informed that the sentencing will proceed in his absence in order to find a knowing and voluntary waiver of the right to presence is consistent with this Court's decision in Anderson. Anderson was warned of the consequences of failing to appear and signed a written waiver of his right to presence if he did not appear. Anderson, 929 P.2d at 1110. This Court's holding in Anderson that the right to presence was knowingly and voluntarily waived fits squarely with a requirement that the defendant must be informed that the proceedings will go on without him in order to find a knowing waiver of the right to presence.

Moreover, in Anderson, this Court explicitly relied on McPherson, stating, "[t]o intentionally relinquish the right to be present, the defendant must have notice of the proceedings. United States v. McPherson, 421 F.2d 1127, 1130 (D.C. Cir. 1969)." Anderson, 929 P.2d at 1110. Since the notice required in McPherson was notice that the hearing would proceed even if the defendant was not present, and Anderson had notice that the proceedings would continue without him if he did not appear, the reliance on McPherson appears to require that a defendant be given notice that the hearing will proceed in his absence in order to find a knowing waiver of the right to presence.

The Court of Appeals rejected the requirement that a defendant be given notice of the consequences of his nonappearance, and instead held that a waiver is knowing if the defendant is given notice of the date and time of the hearing. Wanosik, 2001 UT App 241, ¶11-16. The lower court thought that requiring notice of the consequences of

nonappearance would allow defendants to impede the orderly administration of justice by failing to appear. Id., ¶12. This reasoning ignores the likelihood that without such notice, a defendant would not know that sentencing was to proceed without him and the fact that in most cases, the administration of justice is not significantly delayed because most defendants who fail to appear are picked up on a warrant shortly thereafter.

Additionally, any risk of impeding the orderly administration of justice by not proceeding *in absentia* at sentencing is minimal because the conviction has already been secured and any sentence imposed *in absentia* cannot be carried out until the defendant is back before the court. Regardless of whether the absent defendant is sentenced, a bench warrant will be issued and the defendant will be subject to being picked up and jailed.

The Court of Appeals also rejected the requirement that the defendant know of the consequences of his failure to appear because, according to the court, "[t]he United States Supreme Court has . . . explicitly rejected McPherson's holding requiring such a warning. See Taylor, 414 U.S. at 20 n.3, 94 S.Ct. at 196 n.3 ('[T]he Court of Appeals . . . disagreed with McPherson, and, in our view, rightly so.'" Wanosik, 2001 UT App 241, ¶13. While Taylor did reject the holding in McPherson that a defendant who flees mid-trial must be warned of the consequences of his absence in order for there to be a knowing and voluntary waiver of the right to presence, Taylor did not reject the more general concept in McPherson that for there to be a knowing waiver of the right to presence, the defendant must know that the proceeding will go forward in his absence.

As the United States Supreme Court explained, a defendant who flees mid-trial after a jury has been selected and where witnesses and lawyers are present knows that the trial will proceed even if he is not there. Crosby, 505 U.S. at 261-62. McPherson therefore acted knowingly when he absented himself mid-trial and notice that the trial would proceed without him was not necessary under those circumstances. This Court's citation in McPherson for the proposition that any waiver of the right to be present must be knowing, despite the language in Taylor, demonstrates that the McPherson requirement that the defendant must know the consequences of the nonappearance in order to waive the right to presence has continuing vitality after Taylor.

Finally, the Court of Appeals rejected the distinction in Crosby between mid-trial and pretrial flight by reasoning that the language of Fed. R. Crim. 23 makes that distinction and therefore the Crosby distinction is based on the federal rules and not constitutional concerns. Wanosik, 2001 UT App 241, ¶14-15. While Crosby was decided based on the Federal Rules of Criminal Procedure, the concern in Crosby that defendants who do not appear at the commencement of trial--or sentencing--do not know that the case will proceed without them touches on constitutional concerns. A defendant who does not know that the case will proceed in his absence has not knowingly waived his right to presence and therefore should not be sentenced *in absentia*. Since nothing in the record establishes that Wanosik knew he would be sentenced *in absentia*, Wanosik did not knowingly waive his right to presence.

C. THIS COURT SHOULD REQUIRE THAT PUBLIC INTEREST IN PROCEEDING OUTWEIGH THE DEFENDANT'S INTEREST IN BEING PRESENT IN ORDER TO SENTENCE A CRIMINAL DEFENDANT *IN ABSENTIA*.

In addition to requiring that any waiver of the right to presence must be knowingly and voluntarily made, this Court should utilize its supervisory power[6] to require trial courts to weigh the public interest in proceeding against the defendant's interest in being present before allowing a defendant to be sentenced *in absentia*. Requiring trial courts to balance the public interest in proceeding against the defendant's interest in being present ensures that trial courts "vigorously safeguard" the right to presence. United States v. Fontanez, 878 F. 2d 33, 36-37 (2d Cir. 1989). The factors to be considered when balancing such interests include "the possibility that [the] defendant could be located within a reasonable period of time, the difficulty of rescheduling," and the burden on the state in not proceeding. People v. Parker, 57 N.Y.2d 136, 140-42, 440 N.E.2d 131 (N.Y. 1982). Application of such a balancing test helps make sure that only those cases where sentencing must proceed to preserve the state's interests go forward in the absence of the defendant, thereby protecting the right to presence along with the state's interests.

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[6] State v. Bennett, 2000 UT 34, ¶¶12-14, 999 P.2d 1 (Durham, J., concurring), outlines numerous circumstances in which this Court has exercised its supervisory power. A review of that list demonstrates that requiring trial courts to balance the public interest in proceeding against the defendant's interest in being present before proceeding *in absentia* is an appropriate area for this Court to exercise its supervisory powers. The importance of the right to presence, the integrity of the system, and respect for the dignity of individual defendants all require that this Court exert its supervisory influence in this context.

Various courts require that the interests of the parties be weighed before a court can sentence a defendant *in absentia*. See Smith v. Mann, 173 F.3d 73, 76 (2d Cir. 1999) ("the public interest in proceeding [must] clearly outweigh[] the interest of the voluntarily absent defendant in attending" in order to proceed *in absentia*); Fontanez, 878 F.2d at 36-37 (same); Pinkney v. State, 711 A.2d 205, 219 (Md. 1998) (even if a defendant makes a constitutionally adequate waiver of his right to presence, court must consider all relevant factors before proceeding *in absentia*); Parker, 440 N.E.2d at 1315-17 (same). In Anderson, this Court also considered practical considerations, thereby employing a balancing test, before concluding that Anderson should be sentenced *in absentia*. Anderson, 929 P.2d at 1111.

A requirement that courts balance the interests before proceeding *in absentia* when there is a waiver is based on "the recognition that the public interest and confidence in judicial proceedings is best served by the presence of the defendant . . . ." Pinkney, 711 A.2d at 214. Fairness, the appearance of justice, and the efficient administration of cases are all served by such a balancing test. In the sentencing context, such a balancing test recognizes the importance of a defendant's presence at sentencing not only so that he can give appropriate input to the court regarding information pertinent to sentencing, but also so that the court can address the defendant. Not all cases in which a defendant has waived his or her right to presence require that the state proceed in the absence of the defendant. See Pinkney, 711 P.2d at 214. Employing the balancing test

limits those cases that proceed *in absentia* to cases where such a procedure is necessary.

The balancing test also lays to rest any concern about defendants who are trying to manipulate the system by not appearing. In cases where not proceeding would affect the administration of justice, the balancing test works in favor of proceeding *in absentia.*

Application of the balancing test in this case demonstrates that the public interest in proceeding did not outweigh Wanosik's interest in being present. Wanosik could have been easily located and brought into court. He had lived in the area for fifty years and had a stable marital and work history. R. 8. His home address and employer's address and phone number were in the court file. R. 8. Given Wanosik's stability and ties to the community, it is probable that he could have been "located within a reasonable period of time" had the judge continued sentencing. Parker, 440 N.E.2d at 1317.

The record does not show any burden on the state which would be caused by continuing the sentencing date. In fact, the favorable recommendation by AP&P, the minimal jail sentence recommended and the recommendation for treatment all demonstrate that society's interests would have been better served by rescheduling sentencing and bringing Wanosik before the court so that he would hear and understand the basis for the sentence and receive a sentence which included drug treatment rather than an extended jail stay.

Moreover, because sentencing hearings take a relatively short amount of time and appear on calendars with other sentencings and less time consuming matters,

rescheduling would not have been difficult. Because all of the considerations weighed in favor of rescheduling sentencing, society's interests and those of Wanosik would have been best served by continuing this sentencing. Judge Frederick therefore erred in sentencing Wanosik *in absentia*.

D. THE ERROR IN SENTENCING WANOSIK *IN ABSENTIA* WAS HARMFUL.

When the court errs in sentencing *in absentia*, the remedy is to require a new sentencing without considering harm. See generally State v. Johnson, 856 P.2d 1064, 1071 (Utah 1993) (vacating sentence which was imposed in violation of due process), superceded by statute on other grounds, 2000 UT App 230, 8 P.3d 274. Assuming, *arguendo*, a harmless error review is conducted, however, the focus is on the likelihood of a more favorable sentence if the defendant had been present. In this case, where AP&P recommended only twenty days jail based on Wanosik's favorable background but the judge imposed the maximum based only on Wanosik's nonappearance, the record demonstrates the error in proceeding *in absentia* was harmful.[7]

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[7] The Court of Appeals employed an incorrect analysis in assessing harm. Rather than remanding for a new sentencing based on the constitutional error or focusing on the likelihood of a more favorable outcome, the Court of Appeals concluded that the error was harmless because Wanosik later wrote a letter indicating that he did not have a "legitimate excuse" for not being present at sentencing. Wanosik, 2001 UT App 241, ¶26.

Wanosik's letter, written after he was in jail, is not pertinent to the issue of whether at the time of sentencing, Judge Frederick erred in proceeding *in absentia* since that letter was not available to the judge when he decided to proceed *in absentia*. The letter also does not relate to a determination as to whether the error in proceeding *in*

POINT II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT VIOLATED DUE PROCESS AND UTAH R. CRIM. P. 22 IN SENTENCING WANOSIK TO THE STATUTORY MAXIMUM WITHOUT BASING THAT SENTENCE ON RELEVANT AND RELIABLE INFORMATION AND WITHOUT AFFORDING COUNSEL THE OPPORTUNITY TO SPEAK AT SENTENCING.

The Court of Appeals held that the trial judge violated Utah R. Crim. P. 22(a) and due process when he sentenced Wanosik *in absentia* without affording counsel the opportunity to address factors relevant to sentencing and without basing the sentence on reliable and relevant information. The Court of Appeals' decision was correct and should be upheld by his Court because (1) Utah R. Crim. P. 22(a) furthers the due process requirements at sentencing by mandating that the trial court afford counsel the

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absentia was harmful because it does not relate to the effect of the error on the sentencing outcome. Instead, information which comes to light after a trial court has properly proceeded *in absentia* based on the circumstances known at the time of the decision is relevant to any attack on the decision to proceed *in absentia* made in a motion for new trial or to arrest judgment. When a court finds a valid waiver and proceeds *in absentia*, some "courts have reached the conclusion that the trial court has an obligation at a subsequent court proceeding to allow a criminal defendant the opportunity to explain the circumstances surrounding an absence at trial." Pinkney, 711 A.2d at 213-14. In this case, however, the initial conclusion was erroneous so a later reconsideration of Wanosik's reasons for being absent was not required.

Moreover, Wanosik's letter does not fully consider the circumstances surrounding his nonappearance and is not a substitute for a hearing where counsel is present and might have been able to convey the reasons for Wanosik's nonappearance. The letter does not indicate Wanosik's reasons for not being present and instead simply indicates that he did not have a legitimate excuse. Wanosik may not have known, however, what a legitimate excuse might be. Confusion about the date, as suggested by defense counsel, could be a legitimate reason for not attending, but Wanosik might not have realized that. In the absence of a hearing, Wanosik's letter labeling his reason for not attending but not specifying that reason does not establish that Wanosik knowingly and voluntarily waived his right to presence.

opportunity to speak regarding factors relevant to sentencing; (2) the illegally imposed sentence was properly reviewed on appeal pursuant to rule 22(e); and (3) due process requires that all criminal sentences be based on relevant and reliable information.

A. RULE 22(a) MANDATES THAT THE TRIAL COURT AFFORD COUNSEL AN OPPORTUNITY TO ADDRESS FACTORS RELEVANT TO SENTENCING.

The state and federal due process clauses "require[] that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing a sentence." State v. Howell, 707 P.2d 115, 118 (Utah 1985); Johnson, 856 P.2d at 1071. A sentence which is not based on reliable and relevant information must be vacated. See id. (vacating sentence based on unreliable PSR); State v. Casarez, 656 P.2d 1005, 1009 (Utah 1982) (vacating sentence where defendant was not supplied with a copy of PSR).

Utah R. Crim. P. 22(a) effectuates the due process requirement that a sentence be based on relevant and reliable information by requiring judges to give both parties the opportunity to present relevant information; see Howell, 707 P.2d at 118 ("[t]o ensure fairness in the sentencing procedure, [Utah R. Crim. P. 22(a)] directs trial courts to hear evidence from both the defendant and the prosecution that is relevant to the sentence to be imposed"). Utah R. Crim. P. 22(a) states in part:

> Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

Rule 22(a) mandates that the court afford a defendant the opportunity not only to exercise his right to allocution[8], but also to present any information which might mitigate the sentence or indicate that sentence should not be imposed. Since counsel acts as an advocate for defendant, the rule also requires that defense counsel be given the opportunity to make a statement and present any information in mitigation of punishment. See generally Casarez, 656 P.2d at 1007 ("[s]entencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel"). Affording defense counsel the opportunity to make a statement and provide information in mitigation of sentence furthers the due process requirement of a fair and reliable sentencing proceeding in addition to ensuring that a defendant facing sentencing is afforded his Sixth Amendment right to counsel. See Id. When the defendant is not present, affording defense counsel the opportunity to speak may provide the only means by which to present information in mitigation of punishment to the court.

Recognizing the role of counsel at sentencing and interpreting rule 22(a) to meet Sixth Amendment protections, the Court of Appeals concluded that an absent defendant nevertheless has the right to exercise his rule 22(a) rights through counsel. Wanosik,

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[8] The right to allocution is guaranteed by Utah R. Crim. P. 22(a) and the Utah Constitution. See State v. Young, 853 P.2d 327, 379-73 (Utah 1993) (Durham, J., concurring and dissenting) (joined by Stewart, J., and Zimmerman, J., in holding that rule 22(a) includes right to allocution); see also Anderson, 929 P.2d at 1111 (right to allocution at sentencing is "an inseparable part of the right to be present," guaranteed by Utah Const. art. I, § 12.

2001 UT App 241, ¶30. In addition, the court recognized that the rule "unequivocally directs" sentencing judges to give the prosecution an opportunity to address sentencing factors and "[i]t would be patently unfair, in the case of an absent defendant, to hear only from the prosecuting attorney and not from defense counsel regarding sentencing considerations." Id. Moreover, the Court of Appeals pointed out that the language of the rule and case law require the trial judge to offer defense counsel the opportunity to speak regarding sentencing factors regardless of whether counsel requests such an opportunity.

> The language of the rule is that "the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment. Utah R. Crim. P. 22(a) (emphasis added). Thus, the rule imposes an affirmative obligation on the trial court to extend the opportunity to be heard; it does not contemplate the court will passively wait for counsel to make a request to be heard. Furthermore, the Utah Supreme Court has said that rule 22(a) "directs trial courts to hear evidence from both the defendant and the prosecution that is relevant to the sentence to be imposed." State v. Howell, 707 P.2d 115, 118 (Utah 1985) [footnote omitted]. This directive is nowhere made conditional on a preliminary request by counsel to present the information. Even if a defendant is voluntarily absent, the trial court has the duty to set its aggravation aside and impose a reasonable sentence, and to that end the court is required to hear evidence from both sides relevant to sentencing. The onus is thus on the trial court to "afford" the defendant and to "give" the prosecutor the opportunity to present relevant information. [footnote omitted]. Utah R. Crim. P. 22(a). The trial court in this case erred by not affording defense counsel an opportunity to present information in mitigation of punishment or giving the prosecutor the opportunity to present information relevant to sentencing.

Wanosik, 2001 UT App 241, ¶32 (emphasis added).

Relying on a single case interpreting the Federal Rules of Criminal Procedure, the state argues that while a federal court is required to extend "an affirmative invitation to the defendant to speak" regardless of whether the defendant requested an opportunity to

do so, the same affirmative obligation to give defense counsel an opportunity to speak is not required. State's brief at 17-18 (citing United States v. Vasquez, 216 F.3d 456, 458-59 (5th Cir.) *cert. denied,* 531 U.S. 972 (2000)). Aside from the obvious problems of relying on Vasquez because it is the only case reaching this decision and interprets the federal rules, Vasquez also does not provide guidance because the circumstances were substantially different. The defendant was present in Vasquez and the judge extended the opportunity to the defendant to speak at sentencing. The court held under those circumstances, there was no obligation under the federal rules to extend an opportunity to speak to counsel who was present and did not ask to speak. By contrast, in the present case, defendant was not present and there was no attempt by the trial court to consider factors relevant to sentencing. While the sentencing court in Vasquez heard from the defendant and made an attempt to consider relevant factors, the court in this case did not.

Other courts appear to take the requirement that the "shall afford" the opportunity at face value. See e.g. United States v. Sisti, 91 F.3d 305, 310 (2d Cir. 1996); United States v. Byars, 290 F.2d 515, 517 (6th Cir. 1961); State v. Koon, 440 S.E.2d 442, 451 (W.Va. 1993). Those cases parrot the language of the rule and require a court to afford defense counsel the opportunity to speak before imposing sentence.

Requiring trial courts to let counsel know s/he can speak on behalf of the defendant will help ensure that full and fair sentencing hearings occur and will not encourage invited error. The rule is and will be clear to trial courts: they must ask for

input from defense counsel or the sentence will not be legally imposed. This requirement imposes no burden to trial courts and is in fact the procedure utilized by most sentencing judges regardless of whether defense counsel asks to speak.

The state also argues that requiring courts to solicit information from both parties could lead to absurd results because a sentence might be vacated because the prosecutor was not given the opportunity to speak. State's brief at 19. In order to vacate a sentence on rule 22(a) grounds under Wanosik, noncompliance with rule 22(a) must be harmful in that the outcome for the defendant may have been more favorable absent the error. Wanosik, 2001 UT App 241, ¶33. An error in failing to give the prosecutor the opportunity to speak would be harmful only when the prosecutor had information in mitigation of sentencing. In such circumstances, it would not be absurd to vacate a sentence; fairness and due process would require that the sentencing court hear such information if it might affect the sentencing determination.[9]

Because the rule requires the court to afford the defendant the opportunity to speak, the Court of Appeals correctly concluded that the trial court violated the rule when

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[9] The state suggests that the rule 22(a) analysis has already been taken to an improper extreme in State v. Hamling, 2001 UT App 267 (unpublished); see Addendum D. In Hamling, defense counsel was given the opportunity to speak at sentencing, but the prosecutor was not given such an opportunity. Hamling did not argue on appeal that rule 22(a) was violated. Instead, he argued that the trial court erred in sentencing him *in absentia*, and the Court of Appeals agreed. The state's purported concern about absurd extensions of Wanosik and its reliance on Hamling for that proposition are misplaced.

it concluded that Wanosik waived his right to presence then proceeded to sentence Wanosik without pausing and without giving defense counsel an opportunity to address factors relevant to sentencing. This approach furthers the due process goal of a full and fair sentencing hearing.

B. THE UTAH R. CRIM. P. 22(a) VIOLATION WAS PROPERLY REVIEWED PURSUANT TO UTAH R. CRIM. P. 22(e).

The state also claims that the Court of Appeals erred in reviewing the sentence pursuant to Utah R. Crim. P. 22(e). According to the state, the Court of Appeals was required to employ a plain error review because a sentence imposed in violation of rule 22(a) is not an illegally imposed sentence which qualifies for review at any time.[10]

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[10] Petitioner's claim that the Court of Appeals incorrectly proceeded under rule 22(e) relates only to the rule 22(a) violation. The Court of Appeals did not rely on rule 22(e) to reach the error in sentencing Wanosik *in absentia* or the error in sentencing him in violation of the due process requirement that sentences be based on relevant and reliable information. Wanosik, 2001 Ut App 241, ¶28, n. 11.

The due process claims relating to sentencing Wanosik *in absentia* and without conducting a full sentencing hearing or relying on relevant and reliable information were preserved in this case. R. 54:2-4. In fact, after the trial court proceeded to sentence Wanosik without giving either party an opportunity to speak, defense counsel attempted to interject her objection. She was part way through her objection when the court cut her off. Defense counsel stated, "Judge, I would object to that order because I don't think that it takes into account his due process rights or his rights about - -." R. 54:4. The state does not argue that reviewing the due process and absentia issues was error. See Petitioner's brief at 20.

Moreover, Wanosik and the many other defendants who brought this issue to the Court of Appeals argued that the error could be reviewed under the plain error doctrine. See Wanosik's reply brief at 2-3. The plain language of rule 22(a) and the due process requirements at sentencing as outlined in, *inter alia,* Johnson, 856 P.2d at 1071 made the error in not affording counsel the opportunity to speak and not basing the sentence on relevant information obvious. The error prejudiced Wanosik since the presentence report

As a preliminary matter, this Court should refuse to review this claim because the state did not raise that issue in its petition for writ of certiorari, and an argument that the issue was not properly reviewed by the Court of Appeals and therefore the Court of Appeals should be overruled on procedural grounds is not fairly included in the questions presented by the state in its petition. See Coulter & Smith, Ltd. v. Russell, 966 P.2d 852, 856 (Utah 1998) (review limited to issues raised in petitions or fairly included therein).

Moreover, the state's claim that rule 22(e) does not apply to this illegally imposed sentence is incorrect. Utah R. Crim. P. 22(e) provides that "[t]he court may correct an illegal sentence, *or a sentence imposed in an illegal manner*, at any time." Utah R. Crim. P. 22(e) (emphasis added). The state's argument that the sentence imposed in violation of Utah R. Crim. P. 22(a) is not an illegal sentence for rule 22(e) purposes disregards the language of the rule that allows for review not only of an illegal sentence, but also of a sentence imposed in an illegal manner.

Rule 22(e) allows a trial or appellate court to review an illegal sentence or a sentence imposed in an illegal manner at any time. State v. Brooks, 908 P.2d 856, 859 (Utah 1995). Allowing an appellate court to vacate a sentence pursuant to rule 22(e)

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recommended only twenty days of jail and, instead, the trial judge imposed the statutory maximum.

The Court of Appeals therefore had several means by which it could review these errors: straight preservation, Utah Rule Crim. P. 22(e) and plain error. Even if the state were correct in its rule 22(e) analysis, which it is not, this issue could properly be vacated on appeal either as plain error or because the trial court did not allow defense counsel to fully state her objection.

even though the issue was not raised below "makes theoretical sense because an illegal sentence is void and, like issues of jurisdiction, should be raisable at any time." Id. at 860. In addition, "considerations of judicial economy" also support the determination that an appellate court can review a challenge to a sentence pursuant to rule 22(e) which is raised for the first time on appeal. Id.

While rule 22(e) allows an appellate court to review a challenge to the legality of a sentence which is raised for the first time on appeal, rule 22(e) "does not allow an appellate court to review the legality of a sentence when the substance of the appeal is not a challenge to the sentence itself, but to the underlying conviction." Id. In other words, "[a] request to correct an illegal sentence under rule 22(e) presupposes a valid conviction" and "issues concerning the validity of a conviction are not cognizable under rule 22(e)." Id. On the other hand, challenges to the legality of the sentence are reviewable under rule 22(e).

The rationale outlined by this Court in Brooks for allowing an appellate court to review an illegal sentence when the issue is raised for the first time on appeal applies with equal force to this case. The sentence is illegal because the correct procedure for imposing sentence was not utilized; the sentence therefore is void. Considerations of judicial economy support the notion that the sentence should have been vacated on appeal rather than requiring the defendant to seek relief elsewhere.

A rule 22(a) violation fits within the types of matters which can be reviewed under rule 22(e). Not only is the sentence illegal because it was imposed without due process or rule 22(a) protections, it also was *imposed in an illegal manner* because Judge Frederick failed to comply with rule 22(a). Pursuant to the plain language of rule 22(e), this illegally imposed sentence could be reviewed for the first time on appeal.

The state's argument that this case does not fit within the categories of cases in which this Court has reviewed an error under rule 22(e) is not convincing. See State's brief at 21-24. The rule does not limit review to cases in which the sentence is ambiguous, the court lacks jurisdiction, or the sentence exceeds that which is authorized by law. Instead, rule 22(e) applies to any illegal sentence or any sentence imposed in an illegal manner. Just because this Court has not yet addressed a rule 22(a) claim pursuant to rule 22(e) does not mean that such a claim does not fall within the rule.

Moreover, the state's list of cases which have held that the claim cannot be addressed under rule 22(e) support the notion that Wanosik's attack on his sentence was properly reviewed under rule 22(e). All of the cases listed by the state in which a Utah appellate court has refused to review a claim under rule 22(e) involve attacks on the *conviction* rather than the sentence.

State v. Wareham is the only case cited by the state in support of this argument which merits comment. 801 P.2d 918 , 919-920 & n. 3 (Utah 1990). In Wareham , like the other cases where this Court has refused to review an issue under rule 22(e), the

defendant was attacking his *conviction* rather than his sentence. After Wareham's conviction was affirmed on appeal, Wareham raised a new issue, claiming that the aggravated sexual abuse of a child statute was improperly applied to him because it was enacted after his crime. The change in the statute elevated a second degree felony sexual abuse of a child to a first degree felony aggravated sexual abuse of a child if the added element that the defendant committed five or more acts was found. This Court rejected Wareham's arguments in his second appeal because they were an attack on his *conviction* which should have been brought in the original appeal. Id. at 920. While the Court did not directly analyze the application of rule 22(e) in this context, a conclusion that the claim could not be reviewed pursuant to rule 22(e) is consistent with this Court's case law which limits rule 22(e) review to challenges to the sentence.

The state's claim that Wareham involved a sentencing enhancement and is an example of a case where this Court refused rule 22(e) review where "[t]he trial court bases its sentencing on inappropriate factors" (state's brief at 23) is simply incorrect. Wareham involved an attack on the conviction and rule 22(e) treatment was therefore improper. Moreover, as the state recognizes (State's brief at 24 n. 9), the recent decision in State v. Maguire, 1999 UT App 45, ¶6 n. 1, 975 P.2d 476 recognizes that this type of issue can be reviewed for the first time on appeal under Utah R. Crim. P. 22(e).

The state's reliance on New Jersey and Florida case law is likewise not compelling. Those cases do not deal with this situation, are not persuasive, and are based

on rules which do not contain the same language as the Utah rule. Indeed, neither rule includes language regarding imposition of a sentence in an illegal manner.

Rule 22(e) is designed to allow review in precisely this type of case. There is no question the trial judge ignored the requirements of due process and rule 22(a) when he sentenced Wanosik. The illegality of these sentences requires review and rule 22(e) plainly allows for such review.

C. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT WANOSIK'S SENTENCE MUST BE VACATED WHERE THE TRIAL JUDGE DID NOT CONDUCT A FULL AND FAIR SENTENCING HEARING AND THE SENTENCE WAS NOT BASED ON RELEVANT AND RELIABLE INFORMATION.

"A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system." State v. McClendon, 611 P.2d 728, 729 (Utah 1980). Although a sentencing judge has discretion in imposing sentence, s/he must nevertheless impose sentence in a reliable manner which fits due process requirements. Indeed, Utah appellate courts "have consistently sought 'to shore up the soundness and reliability of the factual basis upon which the judge must rely in the exercise of that sentencing discretion.'" Wanosik, 2001 UT App 241, ¶34 (quoting State v. Lipsky, 608 P.2d 1241, 1249 (Utah 1980)). A sentence which is not based on reliable and relevant information must be vacated. Johnson, 856 P.2d at 1071-75; Casarez, 656 P.2d at 1009.

The Court of Appeals recognized the due process requirements and need for

reliability at sentencing in this case. Because the record failed to disclose any factor other than Wanosik's absence from sentencing upon which the sentencing court relied, the Court of Appeals held that the trial court had violated due process. The Court stated:

> The record in this case fails to disclose any relevant or reliable information, other than the fact that defendant was absent from the proceeding, relied on by the trial court in imposing maximum - - albeit concurrent - - sentences for both crimes. Voluntary absence from sentencing may properly serve as one factor in determining an appropriate sentence, as it is an indirect - - but telling - - indication of the defendant's suitability for probation or susceptibility to rehabilitative efforts. It is not, however, sufficient to rely on that fact alone in deciding what sentence to impose, nor may such absence be punished by imposing a sentence more severe than is otherwise warranted. From all that appears in the record, however, Wanosik's absence at sentencing was the only information considered by the trial court in deciding what sentences to impose.
>
> Wanosik's Due Process rights were compromised by the trial court's failure to base its sentencing decision on relevant and reliable information regarding the crime, Wanosik's background, and the interests of society. For the same reasons noted in the preceding section, the trial court's failure to base its sentencing decision on relevant and reliable information was not harmless.

Id., ¶¶35-36.

1. Although the Court of Appeals Did Not Hold that Due Process Requires the Sentencing Judge to Solicit Information from the Parties, Such a Requirement Fits within the Due Process Requirements at Sentencing.

The state argues that the decision is incorrect because due process does not require the trial court to affirmatively solicit sentencing information. Petitioner's brief at 28. While the Court of Appeals held that Utah R. Crim. P. 22(a) required the trial judge to afford defense counsel the opportunity to present information relevant to sentencing, it did not directly hold that due process required the court to solicit such information.

Instead, the Court of Appeals held that due process required the trial judge to base his sentencing decision on reliable and relevant information, and that "[t]he record in this case fails to disclose any relevant or reliable information, other than the fact that defendant was absent from the proceeding, relied on by the trial court in imposing maximum - - albeit concurrent - - sentences for both crimes." Wanosik, 2001 UT App 241, ¶¶35-36. That holding is firmly grounded in Utah case law. See e.g. Johnson, 856 P.2d at 1071; Howell, 707 P.2d at 118; Lipsky, 608 P.2d at 249.

Although the Court of Appeals based its due process analysis on the trial court's "failure to base its sentencing decision on relevant and reliable information," requiring the judge to affirmatively solicit sentencing input as part of the due process protection at sentencing would ensure that due process concerns are met at sentencing. In any case where the judge does not have reliable and relevant sentencing information before him, soliciting that information from counsel facilitates the requirement that the sentencing decision be based on relevant and reliable information while also ensuring that a full and fair sentencing hearing is held.

The state argues, however, that soliciting sentencing information from the parties is not required by due process based on a single case issued by this Court over thirty years ago. See state's brief at 28-29. According to the state, State v. Kelbach, 461 P.2d 297, 299 (Utah 1969), *vacated in part*, 408 U.S. 935 (1972), which concluded that the failure to ask a defendant, who is represented by counsel, whether he wants to exercise

his allocution right "does not in itself constitute constitutional error," resolves this issue.

Kelbach does not resolve the issue of whether due process requires a sentencing court to solicit information from the parties for a number of reasons. First, Kelbach discusses a defendant's right to allocution, not the defendant's due process right to have sentencing based on relevant and reliable information. Kelbach was represented by counsel and a penalty hearing was otherwise held. In that context, where the sentencing authority was presented with information relevant to sentencing, this Court simply concluded that the trial court was not also required to ask the defendant whether he wanted to speak. Kelbach involved an entirely different situation than the present case where no information relevant to sentencing was presented.

Second, Kelbach leaves open the possibility that while failing to ask the defendant whether he wants to allocute "does not in itself constitute constitutional error," when coupled with a failure to solicit any information relevant to sentencing, constitutional error might occur. In other words, Kelbach does not address the situation in the present case where no information is presented to the sentencing court.

Third, Kelbach is disfavored not only because it has been overruled, but also because the passage of time and changes in the law bring its conclusion into question. See State v. Young, 853 P.2d 327, 376-77 (Durham, J., concurring and dissenting). The more recent decisions of Anderson, Johnson, Howell, Lipsky, and Young all bring into question what continuing life, if any, this conclusion in Kelbach might have.

Finally, Kelbach does not resolve the issue of whether the sentencing judge must solicit information from the parties because, at most, Kelbach addresses only federal constitutional concerns. See Young, 853 P.2d at 377 (Durham, J., concurring and dissenting). The due process protections at sentencing embraced in Johnson , Howell and Lipsky are all firmly rooted in the state constitutional due process protection. Those cases suggest that a sentencing judge is required to solicit information from parties in order to meet state due process concerns at sentencing.

2. The Court of Appeals Correctly Held that the Record Failed to Show that the Trial Court Based the Imposition of the Statutory Maximum Sentence on Relevant and Reliable Information.

The Court of Appeals correctly concluded that the record does not include any relevant or reliable information, other than Wanosik's absence, which was relied on by the trial court in imposing the maximum sentence. See Wanosik, 2001 UT App 241, ¶30. While defense counsel indicated on the record that the presentence report was favorable, she was not afforded the opportunity to discuss specific information or recommendations in the report. R. 54:1-4. Nor did the judge acknowledge the information or recommendations in the presentence report during the hearing. See generally R. 54. Instead, the trial court concluded that Wanosik was voluntarily absent and moved immediately into sentencing him to the maximum term. R. 54:2-4.

The trial court's gross deviation from the PSR recommendation without acknowledging the details of the PSR or indicating the basis for the deviation

demonstrates that the judge failed to consider the information in the PSR when assessing sentence. When that gross deviation is considered in the context of the hearing, where the judge focused only on the defendant's absence and did not seem to think any additional information was necessary in order to sentence Wanosik, it is apparent that the judge did not consider additional factors. Additionally, Utah Code Ann. § 77-18-1(7) (1999) requires that the trial court receive information relevant to sentencing in open court. In this case, the only information presented in open court was the fact of Wanosik's absence. The record more than adequately demonstrates that the judge based the sentence solely on Wanosik's absence.

In addition, however, the Court of Appeals had a number of other appeals pending before it in which this same judge sentenced defendants to the statutory maximum when the defendant did not appear at sentencing. See footnote 1, supra at 2. In each case, the judge imposed the statutory maximum based solely on the defendant's absence. These other cases further demonstrate that the judge did not consider relevant and reliable information and instead based the decision to impose the maximum sentence solely on Wanosik's absence.

A review of the record further demonstrates that relevant factors did not support the imposition of a maximum sentence. Wanosik was convicted of class A attempted possession of a controlled substance and class B possession after he was detained and searched when found rummaging through a Deseret Industries bin of donated items.

R. 5-6, 18-23. The AP&P agents, who are experienced in preparing presentence reports and supervising probation, "believe[] the defendant is a good candidate for some type of supervised probation." PSR at 10. Based on Wanosik's background and the relatively minor nature of the crimes, the PSR recommends that Wanosik serve twenty days of jail, with credit for the eight days, then be placed on probation. PSR at 11.

Additional information supported probation rather than a maximum sentence. Wanosik had been married for twenty-four years and had a relatively stable work history. PSR at 5, 8. He had only one conviction in 1995 for retail theft. PSR at 4.[11] This additional favorable information further demonstrates that the sentence was not based on relevant and reliable factors.

The state complains that reviewing the context of this record and concluding that the judge based the sentence solely on absence conflicts with the presumption of regularity. The application of such a presumption as the state suggests would curtail the constitutional protections mandating a full and fair procedure. According to the state's argument, any sentence must be constitutionally acceptable, regardless of how unfair the procedure or how minimal or nonexistent the hearing, because the sentence is presumed to be fair. No such presumption saves the unfair and unconstitutional sentencing

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[11] The PSR also contains three remote arrests in the early 1970's. PSR at 4. Without a disposition showing a conviction, these charges could not properly be considered to increase the sentence. In addition, the passage of a significant amount of time--close to thirty years--made these remote arrests of no significance to the sentencing decision.

procedure utilized in this case.

Moreover, any presumption of regularity which may attach has been more than overcome. The only information considered in open court was Wanosik's absence. The judge did not afford counsel the opportunity to address sentencing factors and instead concluded that Wanosik was voluntarily absent then proceeded to immediately sentence him to the maximum term. Even if a presumption of regularity did attach to sentencing proceedings, that presumption was more than overcome by the procedure utilized at sentencing in this case.[12]

In this case where the trial court failed to conduct a full and fair sentencing hearing and failed to impose sentence based on relevant and reliable information, the sentence was properly vacated and the case remanded for a new sentencing hearing. Moreover, even if a harmless error review were required, harm is evident in this case where the PSR recommended twenty days jail. Had the judge based the sentence in this

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[12] The state has not argued on certiorari review that absence alone is sufficient to impose the statutory maximum sentence. This probably is the case because it is clear that the sentence must be based on more than the single factor of absence. See McClendon, 611 P.2d at 729 ("A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system."). Moreover, common sense dictates that imposing a maximum sentence based solely on a failure to appear can result in sentences which are not appropriate in light of society's interest, the nature of the crime, or the defendant's background and which impact profoundly on criminal justice resources. While ramifications for failing to appear such as being picked up on a warrant and having to spend several days in jail while waiting to see a judge should and do exist, scarce bed space at jails is not best utilized when the defendant's background and crime do not warrant the maximum sentence.

case on relevant and reliable factors, the outcome would have been different.

CONCLUSION

Respondent Anthony Wanosik respectfully requests that this Court vacate his sentence.

RESPECTFULLY SUBMITTED this 11th day of July, 2002.

JOAN C. WATT
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Attorney for Defendant/Respondent

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that I have caused to be delivered the original and nine copies of the foregoing to the Utah Supreme Court, 450 South State Street, 5th Floor, P. O. Box 140210, Salt Lake City, Utah 84114-0210, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 11th day of July, 2002.

Joan C. Watt
JOAN C. WATT

DELIVERED to the Utah Supreme Court and the Utah Attorney General's Office as indicated above this _____ day of July, 2002.

_____

ADDENDA

ADDENDUM A

31 P.3d 615
428 Utah Adv. Rep. 10, 2001 UT App 241
(Cite as: 31 P.3d 615)

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Anthony James WANOSIK, Defendant and Appellant.

No. 20000541-CA.

Aug. 16, 2001.

Defendant who pleaded guilty to drug charges in the District Court, Salt Lake Department, J. Dennis Frederick, J., and was sentenced in absentia. Defendant appealed. The Court of Appeals, Orme, J., held that: (1) defendant was not entitled to explicit warning that, even if defendant were absent, the court might proceed with sentencing; (2) sentencing court was required to inquire into defendant's ability to appear at sentencing proceeding, and State was required to make preliminary showing of voluntariness of defendant's absence, before sentencing court could decide that defendant had waived his right to be present; (3) sentencing court's failure to properly inquire into whether defendant's absence at sentencing hearing was voluntary was harmless error; and (4) sentencing court's failure to hear evidence from prosecutor and defense counsel at sentencing hearing was not harmless error.

Vacated and remanded.

West Headnotes

[1] Sentencing and Punishment 341
350Hk341 Most Cited Cases

A criminal defendant's right to be present at all stages of trial includes the right to be present at sentencing.

[2] Criminal Law 636(1)
110k636(1) Most Cited Cases

To intentionally relinquish the right to be present, the defendant must have notice of the proceedings. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[3] Sentencing and Punishment 345
350Hk345 Most Cited Cases

Defendant's right to be present at all proceedings may be waived by defendant's voluntary absence from sentencing; this waiver must be voluntary and involve an intentional relinquishment of a known right. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[4] Sentencing and Punishment 345
350Hk345 Most Cited Cases

Defendant was not entitled to explicit warning that, even if defendant were absent, the trial court might proceed with sentencing, and thus defendant's voluntary absence from sentencing proceeding after he pleaded guilty did not bar trial court from pronouncing sentence. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[5] Sentencing and Punishment 345
350Hk345 Most Cited Cases

To require an explicit warning that sentencing will proceed even in the defendant's voluntary absence is to conclude that, without such a warning, defendants will assume they have the right to avoid sentencing simply by refusing to appear. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[6] Criminal Law 636(2)
110k636(2) Most Cited Cases

Notice of the proceeding is alone sufficient to allow a defendant to exercise the right to be present by appearing, or to waive that right through voluntary absence. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[7] Criminal Law 636(2)
110k636(2) Most Cited Cases

A defendant need not be warned that the proceedings may go forward in his absence in order to deem voluntary absence a knowing waiver of the right to be present. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[8] Sentencing and Punishment 345
350Hk345 Most Cited Cases

Sentencing court was not required to conduct analysis as to whether the public interest in proceeding with sentencing clearly outweighed the interest of the voluntarily absent defendant in attending the proceeding; neither federal rules nor federal constitution required such a balancing test. Rules

Crim.Proc., Rules 17(a)(2), 22(b).

[9] Criminal Law 636(2)
110k636(2) Most Cited Cases

The fact that a defendant was informed of the time and place of the proceeding allows a court to presume that a defendant's absence therefrom is knowing, i.e., that the defendant knows he is missing the proceeding; the fact that an absent defendant had notice of the proceeding does not, however, allow a presumption that absence therefrom is voluntary. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[10] Criminal Law 636(2)
110k636(2) Most Cited Cases

A trial court may not assume a defendant's knowing absence is voluntary, but rather is required to determine whether a defendant's absence is in fact voluntary. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[11] Sentencing and Punishment 345
350Hk345 Most Cited Cases

Sentencing court was required to inquire into defendant's ability to appear at sentencing proceeding, and State was required to make a preliminary showing of the voluntariness of defendant's absence, before sentencing court could decide that defendant had waived his right to be present at sentencing. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[12] Sentencing and Punishment 345
350Hk345 Most Cited Cases

The voluntariness of defendant's absence from sentencing proceeding may not be presumed by the trial court; rather, an inquiry into the defendant's ability to appear at the proceeding is required. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[13] Sentencing and Punishment 345
350Hk345 Most Cited Cases

The voluntariness of defendant's absence from sentencing proceeding is determined by considering the totality of the circumstances. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[14] Sentencing and Punishment 345
350Hk345 Most Cited Cases

The state carries the burden of showing the voluntariness of defendant's absence from sentencing proceeding. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[15] Criminal Law 636(2)
110k636(2) Most Cited Cases

A defendant must have a compelling reason to stay away from the trial; if his absence is deliberate without a sound reason, the trial may start in his absence. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[16] Sentencing and Punishment 345
350Hk345 Most Cited Cases

When defendant is absent from sentencing proceedings, the State must make a preliminary showing, based on reasonable inquiry, that defendant's absence is voluntary; except as otherwise required by the attorney-client privilege, defense counsel has an obligation to aid the State by being forthcoming with any information defense counsel may have that could be helpful in determining the defendant's whereabouts or reasons for the defendant's absence. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[17] Sentencing and Punishment 341
350Hk341 Most Cited Cases
(Formerly 350Hk582, 110k582)

When neither court nor counsel have information as to why the defendant is not present at sentencing, a continuance will ordinarily be required to allow the prosecution and defense counsel an opportunity to inquire into the defendant's whereabouts and the reasons for his absence. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[18] Sentencing and Punishment 345
350Hk345 Most Cited Cases

Some avenues for establishing voluntariness of defendant's absence at sentencing proceeding are: (1) inquiry of law enforcement agencies to determine whether defendant is incarcerated; (2) inquiry of local hospitals as to whether defendant is admitted to one of them; (3) inquiry of defendant's employer, if employer can be readily determined, as to employer's knowledge of defendant's whereabouts; (4) a reasonably diligent attempt to contact defendant at his residence or other place counsel knows defendant to frequent; (5) inquiry of Pretrial Services or other entity supervising defendant's presentence release; and (6) inquiry of any bail bond company or other person or entity posting bond to secure defendant's appearance. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[19] Sentencing and Punishment 345
350Hk345 Most Cited Cases
(Formerly 110k345)

Once inquiry appropriate to the case has been made, and a compelling reason for the defendant's absence at sentencing proceeding remains unknown, voluntariness, while not guarantied, may then be properly inferred; however, defense counsel must then have the opportunity to rebut the inference of voluntariness. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[20] Criminal Law 1166.14
110k1166.14 Most Cited Cases

A trial court's error in failing to conduct an adequate inquiry into whether a defendant's absence was voluntary does not merit reversal unless the defendant was prejudiced by the lack of adequate inquiry. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[21] Criminal Law 1177
110k1177 Most Cited Cases

Sentencing court's failure to properly inquire into whether defendant's absence at sentencing hearing was voluntary was harmless error, where defendant, after being apprehended, sent letter to sentencing court stating that defendant did "not have a legitimate excuse" for appearing for sentencing. Rules Crim.Proc., Rules 17(a)(2), 22(b).

[22] Sentencing and Punishment 345
350Hk345 Most Cited Cases

[22] Sentencing and Punishment 360
350Hk360 Most Cited Cases

Defendant, by his voluntary absence at sentencing proceeding, waived the right to personally make a statement at sentencing and to personally present information in mitigation of punishment or to show legal cause why sentence should not be imposed; however, sentencing court was required to afford the defendant the opportunity to exercise his allocution rights through counsel. Rules Crim.Proc., Rule 22(a).

[23] Sentencing and Punishment 356
350Hk356 Most Cited Cases

A defendant's personal exercise of the rights granted in the rule of criminal procedure which allows defendant to make a statement at sentencing is referred to as "allocution." Rules Crim.Proc., Rule 22(a).

[24] Sentencing and Punishment 360
350Hk360 Most Cited Cases

Allocution is an inseparable part of the right to be present at sentencing, which a defendant waives by his voluntary absence. Rules Crim.Proc., Rule 22(a).

[25] Sentencing and Punishment 360
350Hk360 Most Cited Cases

A defendant does not altogether waive his allocution rights through voluntary absence at sentencing; he waives only the right to personally exercise them. Rules Crim.Proc., Rule 22(a).

[26] Criminal Law 641.13(7)
110k641.13(7) Most Cited Cases

Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel, and the right to effective assistance of counsel cannot be waived through voluntary absence alone. U.S.C.A. Const.Amend. 6; Rules Crim.Proc., Rules 17(a)(2), 22(b).

[27] Sentencing and Punishment 345
350Hk345 Most Cited Cases

Even when defendant is voluntarily absent from sentencing, and thereby waives his right to allocution, trial court is required to afford defense counsel opportunity to make statement in mitigation of sentence and to give prosecutor opportunity to present information relevant to sentencing. Rules Crim.Proc., Rule 22(a).

[28] Criminal Law 1177
110k1177 Most Cited Cases

Sentencing court's failure to hear evidence from prosecutor and defense counsel at sentencing hearing was not harmless error, even though defendant voluntarily failed to appear at sentencing; defense counsel had to be given an opportunity to present information in mitigation of punishment and prosecutor had to be given an opportunity to present information relevant to sentencing. Rules Crim.Proc., Rule 22(a).

[29] Constitutional Law 270(2)
92k270(2) Most Cited Cases

The state due process clause requires that a sentencing judge act on reasonably reliable and relevant information in exercising discretion in fixing a sentence. Const. Art. 1, § 7.

[30] Sentencing and Punishment 40
350Hk40 Most Cited Cases

[30] Sentencing and Punishment 66
350Hk66 Most Cited Cases

[30] Sentencing and Punishment 90
350Hk90 Most Cited Cases

A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system. Const. Art. 1, § 7.

[31] Constitutional Law 270(2)
92k270(2) Most Cited Cases

[31] Sentencing and Punishment 94
350Hk94 Most Cited Cases

Defendant's state due process rights were violated by sentencing court's failure to base its sentencing decision on relevant and reliable information regarding the crime, defendant's background, and the interests of society, and basing the court's decision solely on defendant's voluntary absence at sentencing. Const. Art. 1, § 7.

[32] Criminal Law 1177
110k1177 Most Cited Cases

Sentencing court's failure to base its sentencing decision on relevant and reliable information regarding the crime, defendant's background, and the interests of society, and basing the court's decision instead solely on defendant's voluntary absence at sentencing, was not harmless error. Const. Art. 1, § 7.

***618** Joan C. Watt, Catherine E. Lilly, and Andrea J. Garland, Salt Lake City, for Appellant.

***619** Mark L. Shurtleff, Attorney General, and Jeanne B. Inouye, Assistant Attorney General, Salt Lake City, for Appellee.

Before JACKSON, Associate Presiding Judge, ORME and THORNE, Judges.

OPINION

ORME, Judge:

¶ 1 Defendant Anthony James Wanosik appeals the sentences imposed by the trial court pursuant to his guilty pleas to attempted unlawful possession or use of a controlled substance and unlawful possession or use of a controlled substance, class A and B misdemeanors, respectively, each in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp.2000). We vacate the sentences and remand for resentencing.

BACKGROUND

¶ 2 The facts are undisputed. Wanosik pled guilty to two misdemeanor drug offenses. At the plea hearing, the trial court told Wanosik that sentencing would be held on May 26, 2000, at 8:30 a.m., and ordered Wanosik to report to Adult Probation and Parole (AP & P) for preparation of a presentence report. The trial court did not specifically inform Wanosik that he could be sentenced in absentia if he failed to appear for sentencing.

¶ 3 Wanosik reported to AP & P, and a presentence report was completed. AP & P recommended that Wanosik be sentenced to twenty days in jail with credit for time served and that he then be committed to a substance abuse treatment program.

¶ 4 A sentencing hearing was held as scheduled on May 26, 2000. Wanosik was represented at the hearing by counsel but did not appear personally at the hearing or at any other time that morning.

¶ 5 Defense counsel expressed to the court her belief that Wanosik had intended to appear for sentencing but had perhaps written down the wrong date. Defense counsel asked the court to wait before issuing an arrest warrant to give counsel time to locate Wanosik. The court denied defense counsel's request and proceeded to impose sentence:

> [G]iven [Wanosik's] failure to appear I will terminate his pre-trial release, issue a warrant for his arrest returnable forthwith no bail. My inclination is to sentence him today, and I recognize you would prefer that I did not, but I am inclined to do so. It is curious that he has failed to appear today, although I can only assume because he has not been in touch with you nor has he been in touch with my court that he has chosen to voluntarily absent himself from these proceedings.
>
> Consequently, it is the judgment and sentence of this Court that he serve the term provided by law in the adult detention center of one year for the class A misdemeanor crime of attempted possession of a controlled substance, and six months for the possession of a controlled substance, a misdemeanor charge to which he has pled guilty. I will order that those terms be served concurrently and not

consecutively, and that they be imposed forthwith. Ms. Garland, in the event he is in touch with you or shows up before he's arrested, then you may approach me, but in the meantime, Mr. D'Alesandro, you prepare the findings of fact, conclusions of law and order determining voluntary absent compliance, and that will be the order.

Defense counsel promptly objected:

MS. GARLAND: Judge, I would object to that order because I don't think that it takes into account his due process rights or his rights about--

THE COURT: Right.

MS. GARLAND: However, I realize that's your order.

THE COURT: Your objection is noted. I'll grant him credit for the eight days he served awaiting imposition or a resolution.

The hearing was then immediately concluded. The prosecutor, Mr. D'Alesandro, was present but made no statement during the sentencing hearing, and the court addressed the prosecutor only to direct him to prepare the court's findings of fact and conclusions of law.

¶ 6 On June 14, 2000, Wanosik, through counsel, filed a timely notice of appeal of the sentences imposed in his absence. Wanosik was arrested a few months later on the warrant issued at the sentencing. After his arrest, ***620** Wanosik sent a brief handwritten letter to the trial court in which he forthrightly acknowledged, with his own emphasis: "I *do not* have a legitimate excuse" for being absent at sentencing.

ISSUES AND STANDARDS OF REVIEW

¶ 7 Wanosik makes two general claims on appeal: (1) that sentencing should not have proceeded in his absence; and (2) that even if sentencing him in absentia was proper, the trial court erred by the manner in which it conducted sentencing.

¶ 8 Under Wanosik's first general claim, i.e., that sentencing should not have proceeded in his absence, we address several distinct issues. First, we address Wanosik's contention that, as a matter of law, a defendant's absence at sentencing cannot be deemed voluntary if the defendant was not warned that sentencing could proceed in his voluntary absence. This contention presents a purely legal question, which we review for correctness. *See State v. Pena,* 869 P.2d 932, 935-36 (Utah 1994). Second, we address Wanosik's argument that even if a defendant's absence is properly deemed voluntary, the trial court may not proceed with sentencing without first balancing society's interest in proceeding and the defendant's interest in being present. This argument also presents a question of law, which we review for correctness. *See id.* Third, we believe that sound analysis requires us to address whether, in this case, the trial court's inquiry regarding the voluntariness of Wanosik's absence was properly conducted. Specifically, we address the questions of what type of inquiry is required of the trial court in making the factual determination of voluntariness; who has the burden of proving voluntariness; and what type of evidence may suffice to meet that burden. These are all legal questions, which, again, we review for correctness. *See id.* Finally, we conclude this first section of the opinion by considering whether any error by the trial court was harmless.

¶ 9 Wanosik's second claim is that, even assuming proceeding with sentencing in his absence was appropriate, "[t]he trial court violated due process and Utah R.Crim. P. 22[(a)] when it sentenced [Wanosik] without considering relevant and reliable information and without affording defense counsel or the prosecutor the opportunity to speak at sentencing." These assertions require us to interpret both the mandates of Rule 22(a) of the Utah Rules of Criminal Procedure and the requirements of Due Process at sentencing. Each of these inquiries pose questions of law, which we review for correctness, granting no particular deference to the conclusions of the trial court. *See Brown v. Glover,* 2000 UT 89, ¶ 15, 16 P.3d 540 ("[T]he interpretation of a rule of procedure is a question of law that we review for correctness."); *State v. Valencia,*2001 UT App 159, ¶ 9, 27 P.3d 573 ("Issues of constitutional interpretation are questions of law, which we review for correctness.").

I. Sentencing in Absentia

[1][2][3] ¶ 10 We begin by addressing Wanosik's claim that the trial court erred by sentencing him in his absence. A criminal defendant's right to be present at all stages of trial includes the right to be present at sentencing. *See State v. Anderson,* 929 P.2d 1107, 1109-11 (Utah 1996). "To intentionally relinquish the right to be present, the defendant must have notice of the proceedings." *Id.* at 1110. *See* Utah R.Crim. P. 17(a)(2), 22(b). "However, this right may be waived ... [by] the [defendant's] voluntary absence from [sentencing]. This waiver must be voluntary and involve an intentional relinquishment of a known right." *State v. Wagstaff,* 772 P.2d 987, 989-90 (Utah Ct.App.1989) (citations omitted). [FN1]

FN1. *Wagstaff* involved a defendant's absence from trial rather than from sentencing. *See*

772 P.2d at 988-89. The Utah Supreme Court, however, has previously relied on both *Wagstaff* and *State v. Houtz,* 714 P.2d 677 (Utah 1986) (per curiam), another Utah case involving a defendant's absence at trial, in addressing a criminal defendant's right to be present at sentencing. *See State v. Anderson,* 929 P.2d 1107, 1110 (Utah 1996) (citing *Wagstaff,* 772 P.2d at 990; *Houtz,* 714 P.2d at 678). Likewise, the Utah Rules of Criminal Procedure treat identically a defendant's right to be present at trial and a defendant's right to be present at sentencing. *See* Utah R.Crim. P. 22(b). We therefore see no basis on which to distinguish between trial and sentencing in our analysis of a defendant's right to be present and a defendant's voluntary waiver of that right.

***621** A. Specific Warning of Consequences

[4] ¶ 11 Notwithstanding that the Utah case law and rules referred to above appear to require only notice to defendant of the proceedings and of the right to be present in order to permit the court to proceed to a determination whether a defendant's voluntary absence is a waiver of the right to be present, Wanosik argues that a further warning is required. Specifically, Wanosik argues he was entitled to be warned that the court might proceed with sentencing if he were to be voluntarily absent. [FN2] We disagree.

FN2. Wanosik references both the Utah Constitution and the United States Constitution as well as the Utah Rules of Criminal Procedure in making this argument. However,

[n]o argument has been made as to why, if we were to uphold the [sentencing] under the Utah [Rules of Criminal Procedure], the result would be different under either the Utah or the federal constitution. We will therefore treat the contention as a single argument with three legal bases rather than as three separate arguments.

State v. Anderson, 910 P.2d 1229, 1232 n. 3 (Utah 1996).

[5][6] ¶ 12 To require an explicit warning that sentencing will proceed even in the defendant's voluntary absence is to conclude that, without such a warning, defendants will assume they have the right to avoid sentencing simply by refusing to appear. *See Taylor v. United States,* 414 U.S. 17, 20, 94 S.Ct. 194, 196, 38 L.Ed.2d 174 (1973) (per curiam). It is inimical to the common respect due our governmental institutions for us to indulge in the presumption that persons will assume they have the right to impede the judicial system by deliberately absenting themselves from criminal proceedings to which they are a party. *See id.* ("It seems ... incredible to us ... 'that a defendant who flees from a courtroom in the midst of a trial--where judge, jury, witnesses, and lawyers are present and ready to continue--would not know that as a consequence the trial could continue in his absence.' " (citation omitted)). [FN3] "The right at issue is the right to be present." *Id.* Notice of the proceeding is alone sufficient to allow a defendant to exercise the right to be present by appearing, or to waive that right through voluntary absence. *See id.* Whether it be trial or sentencing, we must presume defendants fully understand that important proceedings will go forward without them in the event of their voluntary absence. [FN4] Thus, there is no need to specially warn defendants of this obvious fact.

FN3. We acknowledge that a defendant who flees in the midst of a trial may have more reason to know that the proceedings will move forward in his absence than a defendant who absents himself from sentencing after entering a guilty plea. We nevertheless remain unpersuaded that a warning is required to disabuse defendants of the belief that they may prevent their own sentencing through deliberate absence from the sentencing proceeding. We therefore, again, do not distinguish between the right to be present at trial from the right to be present at sentencing, in terms of what type of notice is required to deem a defendant's voluntary absence a knowing waiver of the right to be present. *See* note 1.

FN4. Nor is this some unique feature of the judicial system that will be foreign to the average citizen. Whether one is a season ticket holder or a team member, a scheduled basketball game will go forward whether or not he or she shows up. If one does not appear for a scheduled dental or medical appointment, he or she should expect to be billed anyway. If one misses an employment interview without prior explanation, he or she knows the job will go to someone else.

> While the uniqueness of judicial business makes these examples less than perfect, the expectation in contemporary American society is that one should appear at duly scheduled events or be willing to accept the ramifications of his or her voluntary absence. In most social and commercial arenas, an expectation of unexcused absence without consequence is not the order of the day.

¶ 13 Wanosik observes that although neither *Wagstaff* nor *Anderson* addresses whether a specific warning is required, such a requirement would not be inconsistent with the holdings of those cases. However, the only federal case Wanosik cites directly supporting his proposition that a specific warning is required to inform defendants that sentencing may proceed in their voluntary absence is *United States v. McPherson,* 421 F.2d 1127 (D.C.Cir.1969), which held that such a warning is required. *See id.* at 1129-30. The United States Supreme Court has, however, explicitly rejected *McPherson* 's holding requiring such a warning. *See Taylor,* 414 U.S. at 20 n. 3, 94 S.Ct. at 196 n. 3 ("[T]he Court of Appeals ... disagreed with ***622** *McPherson,* and, in our view, rightly so."). [FN5] Nonetheless, Wanosik maintains that *McPherson* 's holding is good law and cites the more recent United States Supreme Court case, *Crosby v. United States,* 506 U.S. 255, 113 S.Ct. 748, 122 L.Ed.2d 25 (1993), as "further support for the *McPherson* requirement." *Crosby,* however, does not undermine *Taylor* 's rejection of *McPherson* ' s warning requirement.

> FN5. Wanosik observes that the Utah Supreme Court has cited *McPherson* with approval. *See State v. Anderson,* 929 P.2d 1107, 1110 (Utah 1996). However, the Utah Supreme Court's reliance on *McPherson* extended only to the proposition that "[t]o intentionally relinquish the right to be present, the defendant must have notice of the proceedings." *Id.* Nowhere does *Anderson* intimate that any further warning is required. Indeed, *Anderson* implicitly rejects the notion that a further warning is required by affirming the sentencing, in absentia, of a defendant who, although he waived in writing his right to be present at trial, was not explicitly warned that *sentencing* would proceed in his voluntary absence. *See id.* at 1110-11.

¶ 14 *Crosby* interprets Rule 43 of the Federal Rules of Criminal Procedure and holds that, under the explicit language of that rule, a court may never *commence* trial in a defendant's absence. [FN6] *See* 506 U.S. at 258-62, 113 S.Ct. at 751-53. The *Crosby* Court also observes, however, that under Rule 43 a defendant's absence *after trial has commenced* will automatically be deemed a knowing waiver of the right to be present, even without prior warning to the defendant regarding the consequences of voluntary absence. *See* 506 U.S. at 261-62, 113 S.Ct. at 752. Thus, like *Taylor, Crosby* concludes that in circumstances where the federal rules otherwise allow for trial in absentia, a warning is not required to inform defendants that voluntary absence will likely result in trial in absentia. *See Crosby,* 506 U.S. at 261-62, 113 S.Ct. at 752; *Taylor,* 414 U.S. at 20, 94 S.Ct. at 196.

> FN6. Rule 43 of the Federal Rules of Criminal Procedure states in relevant part:
> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
> (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial)[.]

[7] ¶ 15 Significantly, the Federal Rules of Criminal Procedure and the Utah Rules of Criminal Procedure differ in an important respect highlighted by *Crosby.* Federal Rule 43 treats differently absence at the commencement of trial from absence after the commencement of trial. *See* Fed.R.Crim.P. 43; *Crosby,* 506 U.S. at 258-62, 113 S.Ct. at 751-53. The Utah Rules of Criminal Procedure draw no such distinction, but rather treat a defendant's absence at any stage of criminal proceedings similarly to the federal rule's treatment of a defendant's absence after commencement of trial. [FN7] *Compare* Utah R.Crim. P. 17(a)(2), 22(b) *with* Fed.R.Crim.P. 43(a) & (b)(1). Thus, for our purposes, the significance of *Crosby* is that it affirms the United States Supreme Court's view that a warning of the consequences of voluntary absence is not required to deem a defendant's absence

after commencement of trial voluntary. Our holding, therefore, accords with that of the United States Supreme Court when we conclude that a defendant need not be warned that the proceedings may go forward in his absence in order to deem voluntary absence a knowing waiver of the right to be present. Thus, although at least one state mandates a warning like that required in *McPherson, see People v. Link,* 291 Ill.App.3d 1064, 226 Ill.Dec. 369, 685 N.E.2d 624, 626 (1997), we, with the United States Supreme Court, decline to adopt *McPherson* 's holding.

FN7. Rule 17(a)(2) of the Utah Rules of Criminal Procedure states:
In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present....
Furthermore, Utah Rule of Criminal Procedure 22(b) states: "On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence."

***623** ¶ 16 Wanosik was given notice of the date and time of his sentencing. He had the right to appear if he chose; he had no right to assume the matter could be taken care of some other time, when he felt more in the mood to attend. We see no error in the trial court's failure to specifically warn Wanosik that sentencing would proceed in the event of his voluntary absence from the proceeding.

B. Balancing of Interests

[8] ¶ 17 Relying on two in a line of cases from the Second Circuit, Wanosik argues that even if a defendant's absence is properly deemed knowing and voluntary, a trial court may not proceed unless "the public interest in proceeding clearly outweighs the interest of the voluntarily absent defendant in attending." *Smith v. Mann,* 173 F.3d 73, 76 (2nd Cir.), *cert. denied,* 528 U.S. 884, 120 S.Ct. 200, 145 L.Ed.2d 168 (1999). *See United States v. Fontanez,* 878 F.2d 33, 37 (2nd Cir.1989).

¶ 18 The Second Circuit acknowledges "that while [it believes] prudential concerns animate the need for a balancing of interests before a district court exercises its discretion to conduct a trial in absentia, *all that the Constitution requires is a knowing and voluntary waiver of the right to be present at trial.*" *Mann,* 173 F.3d at 76 (emphasis added). *Accord Clark v. Scott,* 70 F.3d 386, 389-90 (5th Cir.1995), *cert. denied,* 528 U.S. 884, 120 S.Ct. 200, 145 L.Ed.2d 168 (1999). The Second Circuit has thus, out of "prudential concerns," hedged their trial courts' discretion to proceed in a defendant's absence by imposing a judicially created balancing test not required by either the federal rules or the United States Constitution. We decline the invitation to adopt a similar balancing test in Utah. When a defendant's absence from a criminal proceeding is properly deemed knowing and voluntary, the trial court may proceed without further inquiry or analysis. Therefore, it was not error for the trial court in this case to fail to balance the public interest in proceeding against Wanosik's interest in being present.

C. Voluntariness Inquiry

[9][10][11] ¶ 19 We haveconcluded that a trial court is *not required* to warn a defendant that trial or sentencing may proceed in the defendant's voluntary absence. We have also concluded that a trial court is *not required* to balance the public interest in resolving the matter against the defendant's interest in being present before proceeding in a defendant's voluntary absence. However, a trial court may not assume a defendant's knowing absence is voluntary, but rather *is required* to determine whether a defendant's absence is in fact voluntary. [FN8] *See State v. Houtz,* 714 P.2d 677, 678 (Utah 1986) (per curiam). We therefore review whether the trial court in this case properly concluded that Wanosik's absence at sentencing was actually voluntary.

FN8. The fact that a defendant was informed of the time and place of the proceeding allows a court to presume that a defendant's absence therefrom is *knowing,* i.e., that the defendant knows he is missing the proceeding. The fact that an absent defendant had notice of the proceeding does not, however, allow a presumption that absence therefrom is *voluntary. See Houtz,* 714 P.2d at 678. After all, such a defendant may be incarcerated on another charge or comatose in a hospital.

¶ 20 The sum of the trial court's oral findings and analysis on the voluntariness of Wanosik's absence at sentencing is the following: [FN9] "I can only assume because he has not been in touch with [defense

counsel] nor has he been in touch with my court that he has chosen to voluntarily absent himself from these proceedings." We do not question the underlying findings of the trial court, i.e., that Wanosik had not been in touch with counsel or the court. These findings, however, suggest nothing more than that no one knew why Wanosik was absent. With no reliable information on the voluntariness of Wanosik's absence, the trial court merely *assumed* that Wanosik's absence was voluntary. [FN10]

FN9. The trial court's written findings and conclusions do not substantively differ from what the court stated orally at the hearing.

FN10. As hereafter more fully explained, case law rejects the legitimacy of such an assumption, but it is not intrinsically an unreasonable one. Statistically, the vast majority of court no-shows spaced it out, could not muster the courage or effort to be present, or got sidetracked in some volitional way. Only a tiny minority find themselves comatose or otherwise involuntarily incapacitated at the time of trial or sentencing. Even those who are incarcerated, assuming it is in this state, usually have the means to let their circumstances be known. *Cf. In re A.E.*, 2001 UT App 202, ¶ 5, 29 P.3d 31 ("Father ... was not transported from the jail for the trial because he did not inform jail officials of the trial dates.").

***624** [12][13][14][15] ¶ 21 "[V]oluntariness may not be presumed by the trial court." *Houtz,* 714 P.2d at 678. Rather, an inquiry into the defendant's ability to appear at the proceeding is required. *See id.* We have not previously detailed the type of inquiry required to determine if a defendant's absence is voluntary. We have, however, outlined some general principles:

> Voluntariness is determined by considering the totality of the circumstances. The state carries the burden of showing voluntariness. A defendant must have a compelling reason to stay away from the trial. If his absence is deliberate without a sound reason, the trial may start in his absence.

State v. Wagstaff, 772 P.2d 987, 990 (Utah Ct.App.1989) (internal quotations and citations omitted). This case presents an opportunity to elaborate on these general principles.

[16][17] ¶ 22 In such circumstances, the State must make a preliminary showing, based on reasonable inquiry, that defendant's absence is voluntary. Except as otherwise required by the attorney-client privilege, defense counsel has an obligation to aid the State by being forthcoming with any information defense counsel may have that could be helpful in determining the defendant's whereabouts or reasons for the defendant's absence. When neither court nor counsel have information as to why the defendant is not present, a continuance will ordinarily be required to allow the prosecution and defense counsel an opportunity to inquire into the defendant's whereabouts and the reasons for his absence.

[18][19] ¶ 23 Ascertaining whether a defendant's absence is voluntary will often be difficult if the defendant is simply a no-show. While we need not in this case definitively prescribe what the State must do to meet its preliminary burden, and while the showing it must make will vary with the facts and circumstances of particular cases, some avenues for establishing voluntariness are: (1) inquiry of law enforcement agencies to determine whether the defendant is incarcerated, *see Houtz,* 714 P.2d at 678 ("When a defendant is in custody, he is not free to make a voluntary decision about whether or not he will attend the court proceedings."); (2) inquiry of local hospitals as to whether the defendant has been admitted to one of them, *cf. State v. Ross,* 655 P.2d 641, 642 (Utah 1982) (per curiam) ("Trial proceeded for four days, when on the fifth day, defendant failed to appear. He was found in a Salt Lake City hospital suffering from a heart attack, diagnosed as minor. His doctor contacted the court and recommended a one-month continuance."); (3) inquiry of the defendant's employer, if the employer can be readily determined, as to the employer's possible knowledge of the defendant's whereabouts; (4) a reasonably diligent attempt to contact defendant at his residence or other place counsel knows the defendant to frequent; (5) inquiry of Pretrial Services or other entity supervising defendant's presentence release; and (6) inquiry of any bail bond company or other person or entity posting bond to secure defendant's appearance. Once inquiry appropriate to the case has been made, and a compelling reason for the defendant's absence remains unknown, voluntariness, while not guarantied, may then be properly inferred.

¶ 24 Defense counsel, however, must then have the opportunity to rebut the inference of voluntariness. Defense counsel may by that time have gathered additional information regarding the defendant's whereabouts and may, for example, be able to contend that although no local hospital shows the defendant as

currently registered, his roommate says he took him to the emergency room the previous evening, suggesting the possible involuntariness of the defendant's absence at a proceeding early the next morning.

¶ 25 In this case, the State made no preliminary showing of voluntariness whatever, and the trial court erred by making "inadequate inquiry into [Wanosik's] ability to appear ***625** on [May 26, 2000] or his subsequent availability before deciding that he had waived his right to be present at [sentencing]." *Houtz,* 714 P.2d at 678.

D. Harmless Error

[20][21] ¶ 26 A trial court's error in failing to conduct an adequate inquiry into whether a defendant's absence was voluntary does not merit reversal, however, unless the defendant was prejudiced by the lack of adequate inquiry. *See State v. Anderson,* 929 P.2d 1107, 1111-12 (Utah 1996) ("It stands to reason that a defendant cannot demand repetition of a trial or sentencing in which he suffered no unfairness."). When finally apprehended, Wanosik sent a letter to the trial court candidly acknowledging: "I *do not* have a legitimate excuse" for not appearing for sentencing. Based on Wanosik's subsequent concession of actual voluntary absence at sentencing, we conclude that Wanosik suffered no prejudice by the trial court's failure to make adequate inquiry into whether his absence was voluntary. Accordingly, the court's error in proceeding to impose sentence was, in this case, harmless.

II. Sentencing Procedure

¶ 27 Wanosik argues that, even if proceeding with sentencing in his absence was appropriate, "[t]he trial court violated due process and Utah R.Crim. P. 22 [(a)] when it sentenced [him] without considering relevant and reliable information and without affording defense counsel or the prosecutor the opportunity to speak at sentencing."

A. Rule 22(a)

[22] ¶ 28 We first address Wanosik's claim that the trial court violated rule 22(a) of the Utah Rules of Criminal Procedure. [FN11] The second paragraph of rule 22(a) states:

> Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

Utah R.Crim. P. 22(a). Initially, we must determine whether Wanosik waived his rights under rule 22(a) by voluntarily absenting himself from the sentencing proceeding.

[23][24] ¶ 29 A defendant's *personal exercise* of the rights granted in rule 22(a) is referred to as allocution. *See State v. Anderson,* 929 P.2d 1107, 1110-12 (Utah 1996); *State v. Kelbach,* 23 Utah 2d 231, 461 P.2d 297, 299 (1969), *vacated and remanded,* 408 U.S. 935, 92 S.Ct. 2858, 33 L.Ed.2d 751 (1972). "[Allocution] is an inseparable part of the right to be present, which [a] defendant waive[s] by his voluntary absence." *Anderson,* 929 P.2d at 1111. Wanosik, therefore, by his voluntary absence, waived the right to personally make a statement at sentencing and to personally present information in mitigation of punishment or to show legal cause why sentence should not be imposed. *See id.*

[25][26][27] ¶ 30 A defendant does not, however, altogether waive his rule 22(a) rights through voluntary absence at sentencing; he waives only the right to personally exercise them. "Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel," *State v. Casarez,* 656 P.2d 1005, 1007 (Utah 1982), and the right to effective assistance of counsel cannot be waived through voluntary absence alone. *See State v. Bakalov,* 1999 UT 45, ¶ 16, 979 P.2d 799 (holding that, in order to waive the right to counsel and "invoke the right of self-representation, a defendant must in a timely manner ' "clearly and unequivocally" ' request [self-representation]" (citations omitted)). Furthermore, rule 22(a) unequivocally directs the ***626** sentencing court to "give[ ] [the prosecuting attorney]

FN11. The State asserts that Wanosik must show plain error with regard to his rule 22(a) claim on appeal because he did not preserve the claim below. We observe "that rule 22(e) [of the Utah Rules of Criminal Procedure] permits the court of appeals to consider the legality of a sentence even if the issue is raised for the first time on appeal." *State v. Brooks,* 908 P.2d 856, 860 (Utah 1995). The *Brooks* holding obviates the need for appellants to show plain error in asserting on appeal unpreserved claims that the sentence imposed by the trial court was illegal. *See id.* at 858-60.

an opportunity to present any information material to the imposition of sentence." Utah R.Crim. P. 22(a). It would be patently unfair, in the case of an absent defendant, to hear only from the prosecuting attorney and not from defense counsel regarding sentencing considerations. Thus, we hold that a sentencing court is required to afford a voluntarily absent defendant the opportunity to exercise his rule 22(a) rights through counsel.

¶ 31 At sentencing in this case, the trial court did hear briefly from defense counsel on the issue of Wanosik's absence concerning any "legal cause why sentence should not [have been] imposed" at that time, Utah R.Crim. P. 22(a); briefly addressed that issue as discussed above; and then proceeded to impose sentence. However, before proceeding with sentencing, the trial court heard from neither defense counsel nor the prosecutor with regard to "information in mitigation of punishment" or "any [other] information material to the imposition of sentence." *Id.* The State argues that under rule 22(a) the burden rests on counsel to request an opportunity to present information relevant to sentencing. The State's argument is contrary to the plain language of the rule and the construction given it in case law.

¶ 32 The language of the rule is that "the court *shall afford* the defendant an opportunity to make a statement and to present any information in mitigation of punishment." Utah R.Crim. P. 22(a) (emphasis added). Thus, the rule imposes an affirmative obligation on the trial court to extend the opportunity to be heard; it does not contemplate the court will passively wait for counsel to make a request to be heard. Furthermore, the Utah Supreme Court has said that rule 22(a) "directs trial courts to hear evidence from both the defendant and the prosecution that is relevant to the sentence to be imposed." *State v. Howell,* 707 P.2d 115, 118 (Utah 1985). [FN12] This directive is nowhere made conditional on a preliminary request by counsel to present the information. Even if a defendant is voluntarily absent, the trial court has the duty to set its aggravation aside and impose a reasonable sentence, and to that end the court is required to hear evidence from both sides relevant to sentencing. The onus is thus on the trial court to "afford" the defendant and to "give" the prosecutor the opportunity to present relevant information. [FN13] Utah R.Crim. P. 22(a). The trial court in this case erred by not affording defense counsel an opportunity to present information in mitigation of punishment or giving the prosecutor an opportunity to present information relevant to sentencing.

FN12. *Howell* actually interpreted the predecessor of Utah Rule of Criminal Procedure 22(a), Utah Code Ann. § 77-35-22(a 1982). *See* 707 P.2d at 118. Current rule 22(a) differs from then-section 77-35-22(a) only in that rule 22(a) omits the words "in his own behalf" from section 77-35-22(a)'s sentence: "Before imposing sentence the court shall afford the defendant an opportunity to make a statement *in his own behalf* and to present any information in mitigation of punishment...." Utah Code Ann. § 77-35-22(a) (1982) (emphasis added). *See also* Utah R.Crim. P. 22(a). If anything, deletion of the italicized phrase emphasizes that while defendant is entitled to make a statement, he need not personally make it.

FN13. We [here] note that it is not just the defendant, but the State as well, that has an interest in the sentence being based on accurate information. Decisions as to the type of rehabilitation program, if any, to which a defendant is assigned and the duration of incarceration both influence the allocation of scarce personnel and monetary resources. Such decisions should be based upon the most reliable data possible as to each defendant so that this State may deal with its criminal justice program as efficiently as possible.
State v. Casarez, 656 P.2d 1005, 1008 (Utah 1982).

[28] ¶ 33 Noncompliance with rule 22(a) in this case was not harmless, as the State suggests. Had either defense counsel or the prosecutor been given a chance to address AP & P's recommendation that Wanosik be sentenced to 20 days in jail with credit for time served and that he then be committed to a substance abuse treatment program, the sentencing outcome for Wanosik may well have been more favorable than the maximum sentences imposed by the trial court. Thus, we vacate Wanosik's sentences and remand for resentencing.

***627** B. Due Process Requirements at Sentencing

[29][30][31][32] ¶ 34 Due Process considerations underscore the propriety of our remand for resentencing. "The due process clause of Article 1, Section 7 of the Utah Constitution, requires that a sentencing judge act on reasonably reliable and

relevant information in exercising discretion in fixing a sentence." *State v. Howell,* 707 P.2d 115, 118 (Utah 1985). "A sentence in a criminal case should be appropriate for the defendant in light of his background and the crime committed and also serve the interests of society which underlie the criminal justice system." *State v. McClendon,* 611 P.2d 728, 729 (Utah 1980). "[T]he sentencing judge[ ][has] discretion in determining what punishment fits both the crime and the offender," but we have consistently sought "to shore up the soundness and reliability of the factual basis upon which the judge must rely in the exercise of that sentencing discretion." *State v.. Lipsky,* 608 P.2d 1241, 1249 (Utah 1980) (requiring disclosure of presentence report to defendant prior to sentencing). Although rule 22(a) implements sound procedures aimed at insuring that the trial court bases its sentencing decision on such information, a criminal defendant's right to be sentenced based on relevant and reliable information regarding his crime, his background, and the interests of society stands independent of Utah Rule of Criminal Procedure 22(a).

¶ 35 The record in this case fails to disclose any relevant or reliable information, other than the fact that defendant was absent from the proceeding, relied on by the trial court in imposing maximum--albeit concurrent--sentences for both crimes. Voluntary absence from sentencing may properly serve as one factor in determining an appropriate sentence, as it is an indirect--but telling--indication of the defendant's suitability for probation or susceptibility to rehabilitative efforts. It is not, however, sufficient to rely upon that fact alone in deciding what sentence to impose, nor may such absence be punished by imposing a sentence more severe than is otherwise warranted. From all that appears in the record, however, Wanosik's absence at sentencing was the only information considered by the trial court in deciding what sentences to impose.

¶ 36 Wanosik's Due Process rights were compromised by the trial court's failure to base its sentencing decision on relevant and reliable information regarding the crime, Wanosik's background, and the interests of society. For the same reasons noted in the preceding section, the trial court's failure to base its sentencing decision on relevant and reliable information was not harmless.

CONCLUSION

¶ 37 A defendant informed of the time and place for sentencing need not be further informed that sentencing may proceed in the defendant's voluntary absence. Furthermore, a sentencing court need not balance society's interest in proceeding against a voluntarily absent defendant with the defendant's interest in being present before proceeding with sentencing in absentia. In this case, the trial court's only error in regard to proceeding in absentia was its inadequate inquiry into the actual voluntariness of Wanosik's absence. The error was, however, harmless given Wanosik's later concession that his absence was indeed voluntary.

¶ 38 Nonetheless, the trial court erred in not complying with Utah Rule of Criminal Procedure 22(a) by failing to afford defendant, through his counsel, an opportunity to present information in mitigation of punishment and by failing to also give the prosecutor an opportunity to present information relevant to sentencing. This course was also at odds with Wanosik's Due Process rights, as the court failed to base its sentencing decision on relevant and reliable information.

¶ 39 We vacate Wanosik's sentences and remand for resentencing.

¶ 40 WE CONCUR: NORMAN H. JACKSON, Associate Presiding Judge, WILLIAM A. THORNE, Jr., Judge.

31 P.3d 615, 428 Utah Adv. Rep. 10, 2001 UT App 241

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ADDENDUM B

Rule 22. Sentence, judgment and commitment.

(a) Upon the entry of a plea or verdict of guilty or plea of no contest, the court shall set a time for imposing sentence which shall be not less than two nor more than 45 days after the verdict or plea, unless the court, with the concurrence of the defendant, otherwise orders. Pending sentence, the court may commit the defendant or may continue or alter bail or recognizance.

Before imposing sentence the court shall afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment, or to show any legal cause why sentence should not be imposed. The prosecuting attorney shall also be given an opportunity to present any information material to the imposition of sentence.

(b) On the same grounds that a defendant may be tried in defendant's absence, defendant may likewise be sentenced in defendant's absence. If a defendant fails to appear for sentence, a warrant for defendant's arrest may be issued by the court.

(c) Upon a verdict or plea of guilty or plea of no contest, the court shall impose sentence and shall enter a judgment of conviction which shall include the plea or the verdict, if any, and the sentence. Following imposition of sentence, the court shall advise the defendant of defendant's right to appeal and the time within which any appeal shall be filed.

(d) When a jail or prison sentence is imposed, the court shall issue its commitment setting forth the sentence. The officer delivering the defendant to the jail or prison shall deliver a true copy of the commitment to the jail or prison and shall make the officer's return on the commitment and file it with the court.

(e) The court may correct an illegal sentence, or a sentence imposed in an illegal manner, at any time.

(f) Upon a verdict or plea of guilty and mentally ill, the court shall impose sentence in accordance with Title 77, Chapter 16a, Utah Code. If the court retains jurisdiction over a mentally ill offender committed to the Department of Human Services as provided by Utah Code Ann. § 77-16a-202(1)(b), the court shall so specify in the sentencing order.

(Amended effective January 1, 1995; January 1, 1996.)

ARTICLE I

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

AMENDMENT XIV

Section 1. [Citizenship — Due process of law — Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives — Power to reduce appointment.]

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.]

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.]

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ADDENDUM C

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

ANTHONY JAMES WANOSIK

Defendant.

Case No. 001905943 FS

Sentencing Hearing
Electronically Recorded on
May 26, 2000

BEFORE: THE HONORABLE J. DENNIS FREDERICK
Third District Court Judge

For the Plaintiff:

Nick D'alesandro
Cnty - Dpty Dist Atty
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For the Defendant:

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PROCEEDINGS

(Electronically recorded on May 26, 2000)

THE COURT: Your Honor, my last matter before you is Anthony James Wanosik, and I've looked for him but I've not been able to find him, your Honor. He did obtain his pre-sentence report.

THE COURT: Is Anthony James Wanosik in the courtroom?

(No response)

THE COURT: Yes, let's discuss that matter for a moment. This is case No. CR00-5943. Ms. Garland, you're appearing in his behalf?

MS. GARLAND: I am, your Honor. I think given that he did go and obtain his pre-sentence report he was intending to show up today, and so I would ask that you hold on to any warrants and give me a chance to find him. I believe he may have simply written down the wrong date.

THE COURT: Well--

MS. GARLAND: I believe that, Judge, because this is a fairly favorable pre-sentence report, so he would have had no reason to try and avoid court today, it would--

THE COURT: Presumably.

MS. GARLAND: Yes, it would have been in his best interest to appear.

THE COURT: I think in the meantime, counsel, given his failure to appear I will terminate his pre-trial release,

issue a warrant for his arrest returnable forthwith no bail. My inclination is to sentence him today, and I recognize you would prefer that I did not, but I am inclined to do so. It is curious that he has failed to appear today, although I can only assume because he has not been in touch with you nor has he been in touch with my court that he has chosen to voluntarily absent himself from these proceedings.

Consequently, it is the judgment and sentence of this Court that he serve the term provided by law in the adult detention center of one year for the class A misdemeanor crime of attempted possession of a controlled substance, and six months for the possession of a controlled substance, a misdemeanor charge to which he has pled guilty. I will order that those terms be served concurrently and not consecutively, and that they be imposed forthwith.

Ms. Garland, in the event he is in touch with you or shows up before he's arrested, then you may approach me, but in the meantime, Mr. D'alesandro, you prepare the findings of fact conclusions of law and order determining voluntary absent compliance, and that will be the order.

MS. GARLAND: Judge, I would object to that order because I don't think that it takes into account his due process rights or his rights about--

THE COURT: Right.

MS. GARLAND: However, I realize that's your order.

THE COURT: Your objection is noted. I'll grant him credit for the eight days he served originally awaiting imposition or a resolution.

MS. GARLAND: All right.

THE COURT: All right, thank you, Ms. Garland.

(Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
)
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That the foregoing proceedings were transcribed under my direction from the electronic tape recording made of these proceedings.

That this transcript is full, true, and correct and contains all of the evidence, all of the objections of Counsel and rulings of the Court and all matters to which the same relate which were audible through said tape recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore the name associated with the statement may not be the correct name as to the speaker.

WITNESS MY HAND AND SEAL this 29th day of June 2000.

My commission expires:
February 24, 2004

NOTARY PUBLIC
residing in Utah County

BEVERLY A. LOWE
NOTARY PUBLIC • STATE of UTAH
471 SOUTH CALIFORNIA AVE.
PROVO, UT 84606
COMM. EXP 2-24-2004

ADDENDUM D

Not Reported in P.2d
2001 UT App 267
(Cite as: 2001 WL 1055702 (Utah App.))

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Jon Donald HAMLING, Defendant and Appellant.

No. 20000813-CA.

Sept. 13, 2001.

Nisa Sisneros and Joan Watt, Salt Lake City, for appellant.

Mark Shurtleff and Jeanne B. Inouye, Salt Lake City, for appellee.

Before GREENWOOD, BILLINGS, and ORME, JJ.

MEMORANDUM DECISION (Not For Official Publication)

PER CURIAM.

***1** Appellant Jon Donald Hamling appeals his sentence imposed in absentia. Hamling pleaded guilty to attempted possession of a controlled substance, a class A misdemeanor. At the time of his plea, he was given a sentencing hearing date of August 4, 2001, and told to contact Adult Probation and Parole for the preparation of a presentence report. Hamling was also ordered released pending sentencing. Hamling participated in the preparation of the presentence report and provided information to Adult Probation and Parole.

Hamling did not appear at his sentencing hearing. Defense counsel indicated that she had had contact with him two weeks prior to the sentencing date, but not since then. The court determined that, because Hamling had not contacted the court and he was not at the sentencing hearing, he had voluntarily absented himself from the proceedings. The judge gave defense counsel an opportunity to provide sentencing information. Counsel spoke on Hamling's behalf and the judge then, without affording the prosecution an opportunity to address sentencing, imposed a sentence of one year of incarceration, the maximum penalty for a class A misdemeanor. Defense counsel filed a motion to correct an illegal sentence in the trial court, which was denied, and this appeal followed.

In sentencing Hamling in absentia, the prosecution bears the burden of making a preliminary showing, based on reasonable inquiry, that defendant's absence is voluntary. *State v. Wanosik,* 2001 UT App 241, ¶ 22, 428 Utah Adv. Rep. 10. Only after inquiry, the court, in appropriate circumstances, may infer that the defendant's absence is voluntary. *Id.* at ¶ 23. Defense counsel must "then have the opportunity to rebut the inference of voluntariness." *Id.* at ¶ 24. The court did not require any evidence from the State and inferred Hamling was voluntarily absent based solely on the fact that the defendant was not present and none of the parties had contact with him within two weeks prior to sentencing.

When neither the court nor counsel have information as to why the defendant is absent, the court should grant a continuance to allow reasonable inquiry into his nonappearance. *Id.* at ¶ 22. This court, in *Wanosik,* set forth some factors the court may consider in determining whether an absence is voluntary. *Id.* at ¶ 23.

Upon remand, sentencing must be in accordance with the procedure set forth in *Wanosik. Id.* at ¶ 38. Such procedure includes giving both the defense *and* the prosecution the opportunity to make a statement prior to sentencing

Lastly, the State argues that post-sentencing trial court docket entries, made after the defendant was subsequently arrested, reflect no good reason why the defendant failed to appear at his sentencing. These later developments have no bearing on whether the defendant was sentenced lawfully as post-sentencing information was not considered in the court's determination of voluntariness.

***2** We vacate Hamling's sentence and remand for resentencing in accordance with *State v. Wanosik.*

2001 WL 1055702 (Utah App.), 2001 UT App 267

END OF DOCUMENT